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CONVEYANCER'S NOTEBOOK

LOCAL INQUIRIES BEFORE CONTRACT

In the Report of the Committee on Local Land Charges (Cmd. 8440), it is stated on p. 8 that a clerk to a local authority is not bound to answer a supplemental inquiry nor is he bound to keep any record on which to base an answer, "Yet all our witnesses agreed that a clerk almost invariably does answer, not only the questions on the set forms, but also any other questions that may be put to him so long as they are not unanswerable or wholly unreasonable. The clerks consider it a public duty to give a purchaser all information in their power which they think he ought to have . . . and they often volunteer information for which they have not been asked." On p. 13 the Report goes on to say: "they do their best to give an inquirer all the information they can, and think it their duty to be as helpful as possible." It was on this footing that the Committee did not recommend any serious extension of registration. They took the view that if answers were made compulsory the purchaser would be placed in a worse position as local authorities would tend to be more cautious and secretive, regarding the questions much as a party to an action regards interrogatories.

A correspondent told us that the clerk of an important county council refused point blank to answer the additional inquiries recommended by Mr. J. F. Garner in (1952) vol. 16, p. 109, notwithstanding an offer to pay an additional fee for his answers. The ground for his refusal was that the printed form of questionnaire had been agreed by the Law Society and therefore he was

not prepared to answer further general questions. The correspondent added that he had always found previously that local authorities were prepared to answer the inquiries in question.

Further inquiries showed that certain local authorities decline to answer additional inquiries other than those on the printed form, but such an attitude appears to be very unusual. We can well understand that sometimes the range of questions is so great that a local authority thinks the solicitor is being unreasonable, but this could not apply to Mr. Garner's suggested inquiries. No doubt the present negotiations between the Law Society and the various bodies concerned will lead to a form which will cut down the number of additional inquiries that may fairly be asked, but no form can cover all cases. If the refusal to answer additional inquiries becomes widespread, the question of extending registration will call for reconsideration.

We are pleased to be able to record that after the attention of the clerk of the county council had been called to the above considerations he answered the additional inquiries for an additional fee of 10s.

Accountants and Solicitors

In the March issue of *Accountancy* Mr. Ernest Evan Spicer, F.C.A., puts forward a well-argued plea for greater co-operation between solicitors and accountants. There is no doubt that many older solicitors look askance at accountants, regarding them as competitors seeking to encroach on legal preserves by taking over company and income tax work. To a large extent solicitors have only themselves to blame for the loss of a certain amount of work to accountants, for, until the war, there was a tendency on their part to ignore taxation law. The Council of the Law Society have for some time recognised that a sound knowledge of the fundamental principles of taxation is essential to solicitors and a generation is growing up ready and able to cope with taxation questions. Mr. Evan Spicer does not suggest that solicitors should yield up any part of their legitimate sphere but suggests that there are many occasions when solicitors should call upon accountants for assistance and vice versa.

In particular, Mr. Evan Spicer contends that solicitors should consider consulting accountants on sales of businesses, in drawing wills for business men, in preparing estate duty affidavits and in drawing partnership articles. There is one valuable suggestion which he makes in relation to estate duty. He points out that the system of appeals in income tax matters to the Special Commissioners is highly satisfactory—among other advantages, appeals are

informal and relatively cheap—and urges that disputes with the Inland Revenue relating to estates of deceased persons should be dealt with in the same way.

We would like to draw attention to two other matters in the article. First, it is pointed out that on a sale of a business there is a tendency by a purchaser to seek to apportion the consideration so as to keep up the value of the stock and to keep down the value of the business premises and goodwill. The result may well be to render the vendor liable to balancing charges (see the Income Tax Act, 1952, s. 292). The vendor is therefore vitally concerned on the apportionment. Secondly, where a partner is selling his share in a business, the question whether a new business claim should be made or not cannot be answered by rule-of-thumb. The outgoing, continuing and incoming partners are all concerned to see that between them they do not pay more tax than is necessary. In some cases this may be achieved by treating the business as a new business, in others by treating it as a continuing one. Accordingly, each case calls for separate consideration and very careful drafting.

Although we do not agree with everything Mr. Evan Spicer says, we think solicitors would find this article well worth reading. He draws attention very clearly to a number of points that solicitors ought not to overlook, but do overlook. We entirely agree that, where a business transaction of any magnitude is involved, a solicitor might well say to his client: What does your accountant think?

The White Paper Proposals on Absolute Covenants against Assignment, etc.

The proposal in the White Paper on Leasehold Tenure (noted *ante*, p. 34), that *absolute* covenants not to assign, alter user or make improvements shall be subject to a proviso that consent shall not be unreasonably withheld, has probably not received as much attention as it merits owing to the other more far-reaching proposals contained in the White Paper. A correspondent writes:

"As to assignment or change of user it will be appreciated that where a landlord lets for a short period or has personal grounds for prohibiting any use except the one specified, or is occupying the other part of the property, it is not unreasonable that he should insist upon an absolute prohibitive covenant. If in such cases the tenant is entitled to insist on assigning to any 'respectable and responsible person' and is entitled to change the user (if not thought by the court to be an unreasonable change), is not the result either (a) that many landlords will insist on very short

lettings, or (b) that the ownership of property is reduced to a right to receive rent from such persons as the court may think fit—those persons to use the property for such purposes as the court may think reasonable?

"I do most strongly submit that, if a landlord is willing to accept a surrender and release his tenant from future liability if he refuses to agree to the particular responsible and respectable assignee or under-tenant proposed by the tenant, he ought to be able to do so. Why should not a landlord be allowed to choose the next occupier if the tenant is not being prejudiced by his insistence on his right to do so?

"And the same point arises in connection with user and so-called improvements. The assumption is that the tenant has quite voluntarily agreed not to assign, sublet, change the user or make alterations, and that the legislature is willing to encourage the tenant to do precisely those things even if the landlord, as the owner, is prepared to say: 'Whilst I will not agree, I will release you from your tenancy and make all appropriate apportionments as to the date of release.'"

The tide has been running against the landlord for many years and we rather agree that, if the proposals are passed into law, the landlord's rights will be altered beyond recognition. As security of tenure will apply to almost every kind of property he will not know when he can get it back, what kind of property it will be when he gets it back, to what kind of use it will be put or what kind of tenant he will have.

Solicitors' Remuneration in Non-contentious Business

In our last issue we stated, on p. 12, that the new Solicitors' Remuneration Orders came into force on March 1, and apply to all business for which instructions are accepted on or after that date. A correspondent writes pointing out that, although this is quite correct so far as concerns the Registered Land Order and Schedule I scale charges under the general Order, the new Schedule II charges apply to all business transacted on or after March 1, even though instructions were received before then. For example, in the case of the administration of a trust, work done prior to March 1 will be charged on the old scale and work done on or after then on the new.

NOTES ON SALES OF LAND AND HOUSE PROPERTY

ISSUED BY THE COURT OF PROTECTION

Note.—Auctioneer's charges on sale (whether by absolute owner or tenant for life) *are limited* to three-fourths of the schedule of charges laid down by the Surveyors' Institution in addition to out-of-pocket expenses. These charges should not (unless the court otherwise directs) be deducted from the deposit or balance of proceeds of sale, but should be paid by the solicitors and included in their costs of sale for taxation by the Master. This should be made quite clear to the auctioneer when instructing him.

1. **Where the receiver considers that a sale should be effected but has not yet obtained the consent of the Master of the Court of Protection,** the following alternative courses are available:—

(a) The normal procedure is to apply to the court, by Formal Application (Form M. & A. 7) for an Order authorising sale (*see* 3 below) accompanied by a statement showing the reasons for the proposed sale. This course is suitable either for a sale by auction or by private treaty.

(b) In the event of an exceptionally good offer being received which it is desired to accept without delay the receiver can enter into a conditional agreement for sale and then apply to the court, by Formal Application (Form M. & A. 7) for an Order confirming it. (*See* 4 below.)

2. **Solicitors should bear in mind, when bespeaking office copies** on the settlement of an Order authorising sale, that an office copy of the Order (or of the relevant portion thereof) will have to be handed to each purchaser on completion.

3. **Where an Order for sale has been made (Course 1 (a) above)** the following points should be noted:—

(*A*) *For a Sale by Public Auction.*—The sale may be advertised as being made "by Order of the Court of Protection." The Particulars and Conditions of Sale (which must not contain any reference to lunacy or unsoundness of mind) should be prepared by the solicitors instructed to conduct the sale. The Master will rely entirely upon such solicitors for the accuracy and sufficiency of the contents and draft Particulars and Conditions will not be settled or approved by the Master. Subject to any necessary adaptation, the following special conditions should be included:—

(1) The property is being sold pursuant to an Order of the Court of Protection.

(2) The amount of the deposit shall be £10 per cent. of the purchase money and shall be paid to
as agents for the (vendor). (Settled Land Act Trustees.)

(3) The vendor as (beneficial owner) (tenant for life) is selling by (his) (her) receiver pursuant to an Order of the Court of Protection dated the
and an office copy of the said Order or of the relevant portion thereof will be handed over on completion and shall be deemed to be conclusive evidence of such authority to sell and the purchaser(s) shall not require the production of or make any requisition or objection in relation to any evidence matter or thing referred to in the said Order or otherwise relating thereto.

(4) The purchase money (of each lot) shall be paid as directed or authorised by the relevant Order or other authority of the court and the conveyance (of each lot) to the purchaser shall be settled and approved at the vendor's expense by the Master of the court.

Note.—Restrictive or other Covenants.—If the property is subject to any such covenants, the Conditions should provide that the property will be sold " and will be conveyed " subject thereto and (if the vendor will remain liable after parting with the property) that the purchaser shall in the conveyance enter into a covenant for indemnity in respect thereof.

Not less than seven days before the date of the auction there should be left with or sent to the court for the purpose of fixing the reserves:—

(a) Printed or clean copy of the Particulars and Conditions, and Poster.

(b) Certificate by the solicitors that the title is in order (*i.e.*, that the property is vested in the patient in the capacity in which (he) (she) offers the same for sale).

(c) Affidavit (or, if the property is valued at less than £500, a certificate in the form of a letter) by an auctioneer as to value and recommended reserves (and lotting, if necessary).

The result of the auction should be reported to the court as soon as possible by letter, enclosing a certificate by the auctioneer showing the date of sale, the purchaser's name and the purchase price.

(*B*) *For a Sale by Private Treaty.*—A contract (which should not contain any reference to lunacy or unsoundness of mind) should be entered into by the receiver "acting on behalf of the vendor pursuant to an Order of the Court of Protection dated the " and it must be a term of the contract that in the event of the approval of the Master of the court not being obtained the contract shall be null and void. The special conditions (Nos. (1) to (4) set out under 3 (*A*) above) should also be inserted as terms of the contract, as well as any clause relating to a covenant for indemnity in respect of restrictive or other covenants as in note to 3 (*A*) above. The original contract should be left with or sent to the court with evidence of value, *i.e.*, an affidavit (or, if the contract price is less than £500, a certificate) by a local valuer (*i.e.*, the estate agent, if any, who negotiated the sale) as to value, exhibiting (or in the case of a certificate enclosing) the contract and stating that the price is the best obtainable and recommending confirmation thereof. There should also be enclosed a certificate by the solicitors that the title is in order (*i.e.*, that the property is vested in the patient in the capacity in which (he) (she) is to convey). If the contract is approved by the Master, it will be initialled by him and returned to the solicitors.

Note.—The address of the vendor (if inserted) should be his home address or that of the receiver. Never that of an institution.

4. **Where no Order for sale has yet been made (Course 1 (b)** *ante*, p. 101)

In the special circumstances mentioned in 1 (b) on page 101 the receiver should enter into a conditional contract in the same way as in 3 (*B*) above (except that the receiver is not expressed in the contract to be acting pursuant to an Order), and evidence of value as in 3 (*B*) should be obtained. Application by Formal Application should then be made to the court for an Order confirming the contract.

Note.—The address of vendor, *see* Note to 3 (*B*) above.

5. **Settlement and Approval of the Purchase Deed**

A clean copy of the draft Purchase Deed, as agreed by all parties, should be left with or sent to the court for settlement and approval

by the Master, accompanied by the original contract and, if the sale was by auction, the auctioneer's certificate of result of sale. An office copy of the Order should not be sent.

Note.—In the case of leasehold property the Master will require to be informed whether the vendor has fully complied with the covenants in the lease.

The Deed (which must in no circumstances be engrossed until the draft has been stamped "Settled and approved by the Master"), should follow the approved form (and include any necessary covenant for indemnity relating to restrictive or other covenants—*see* Note to 3 (*A*)). Model forms appear in most of the modern books of Conveyancing Precedents and two precedents are included, *post*, p. 519, but no attempt should be made to draft the Purchase Deed until the court Order has been perused.

When the approved draft (stamped " Settled and approved by the Master ") has been returned to the solicitors and the engrossment has been made, the latter (bearing a certificate by the solicitors that it is an exact copy of the draft as settled and approved by the Master) should be brought in or sent to the court for sealing, accompanied by the settled draft and, if lodgment in court of the purchase money by the purchaser has been directed, a Certificate of Lodgment (obtainable from the Supreme Court Pay Office, Royal Courts of Justice, London, W.C.2, price 1s.) must also be produced.

Notes.—(1) The settled draft will be retained by the court.

(2) The receiver must not execute the engrossment until it has been sealed.

(3) The receiver, when executing, should write the vendor's name followed by the word " by " and by his own signature.

RIGHTS OF THIRD PARTIES IN REGISTERED PROPERTY

By Theodore B. F. Ruoff, Solicitor

When the red dies of the inland revenue stamps impressed upon a Land Registry transfer take up more space than the typed words that give effect to a valuable transaction, it is fair to claim that simplicity has been achieved in regard to form. But it must not be supposed that this kind of simplification which, in daily practice, is replacing the bulky abstracts, intricate requisitions on title and voluminous deeds of unregistered titles, is the only way in which conveyancing is made easier.

There is the fact that the register of title presents, at a glance, a full and true picture of a landowner's entitlement and of the qualifications and burdens to which his ownership is subject, without there being any need to examine, on the occasion of each succeeding transaction, the derivative links in the chain upon which the current title depends. There is also the fact that there is a certainty and a conclusiveness about registered conveyancing that cannot, in the nature of things, exist in the unregistered system, under which the quality of a particular title is sometimes a matter of individual opinion. The technical defects and deficiencies (many, it is true, of a trivial character), that are the subject of recurrent inquiries or recurrent preclusions from inquiry, are removed for all time when first registration occurs. Thenceforth, if the register indicates that certain transactions are forbidden on the part of, say, a limited owner, or that other transactions must follow a particular form or procedure, that is the end of the matter.

But above all, simplification is accomplished in regard to those difficult and often complex branches of conveyancing that concern the interests of persons other than the owner of the legal estate, whether they be beneficiaries of one kind or another, or people whose rights or claims clash or are incongruent with those of the legal owner. It is not always realised or appreciated that in regard to matters of this nature the Chief Land Registrar does much of the practitioner's thinking for him and that he sometimes makes decisions on questions that in unregistered conveyancing can lead the parties into court. Whether the practitioner values this assistance is another matter. Naturally, trained lawyers are interested in doing skilled work and, as Lord Brougham once put

it, "they love the mysteries which they have spent so much time in learning, and they do not like the rude hand which would wipe away the cobwebs, in spinning which they have spent their zeal." On the other hand it is, of course, easily possible to carry the process of simplification to the extreme at which a landowner is deprived of valuable dispositive powers and an easy functional elasticity is lost. However, the system in England and Wales is far removed from that position.

In the vast English-speaking world beyond these islands, where the Torrens system of registration of title is regarded as the only progressively effective mode of conveyancing, it is customary to protect the rights of third parties, whether they consist of the equitable interests of beneficiaries or the diverse claims of, say, a plaintiff or a prospective purchaser, by one method alone, namely, the caveat. This frequently leads to litigation, for the Registrar is given no adequate power to deal with any dispute or difference. Under the English system, which is infinitely more flexible than any other, four differing methods of protection are provided by the legislature. These are the caution, the restriction, the inhibition, and the notice, and each has its peculiar purpose and particular use, although there is some overlapping.

Between them, these four devices exist not only to safeguard the equitable interests that lie behind the curtain provisions of all the property legislation of 1925 but also to protect the uncomfortably heterogeneous miscellany of interests which, under that system, is registrable under the Land Charges Act, 1925. And, as the writer sought to demonstrate on a previous occasion (*ante*, p. 39) in registered conveyancing the functions of the Land Charges Act are replaced by the comprehensive machinery of the Land Registration Acts. There are, however, two obvious exceptions to this statement. The first is that, in dealing with registered titles that are clearly labelled as deficient (that is, estates registered as possessory or as qualified titles), the practitioner must act in relation to the unregistered title preceding registration or in relation to the specified defect just as if he were dealing with unregistered land (*Cf.* sections 6, 7) (*a*). The second exception is that despite registration of the title of land, searches in the registers kept by local authorities must continue to be made in the normal manner because

(*a*) There is no case law on this subject and the only authorities for the statements in this article are the Land Registration Act, 1925, and the Land Registration Rules, 1925, which are the Act and the Rules referred to throughout the article unless the contrary is indicated. For the provisions governing particular machinery under the Act see the table on pp. 122–123, *post*.

local land charges are expressly excluded from all the statutory provisions which indicate that the Land Charges Act does not concern persons dealing with registered property (see, *e.g.*, section 110 (7)).

With the extension of compulsory registration of title to new areas there is an increasing number of practitioners who are called upon to use the registration machinery without being familiar with it. Therefore it is the purpose of the present article to explain in some detail the ways in which a party other than the proprietor who is interested in registered property, can make his rights and claims known to prospective purchasers and other disponees and the action which a purchaser (or other disponee) ought to take when he learns of the existence of these rights and claims.

Cautions (*b*)

A caution cannot, by its very nature, exist in unregistered conveyancing where its nearest relative—to which, however, it has but little affinity—is the register of pending actions kept at Kidbrooke. Not everyone apprehends the proper purpose or the true effect of a caution, to appreciate which it is necessary to bear in mind that in registered conveyancing two processes go to make an effectual transaction. These are the execution and delivery of an instrument, which cause it to take effect in equity, and the completion of the transaction by registration, which causes it to have legal effect (see, *e.g.*, section 19 (1)).

The purpose of a caution is to enable a person who is "interested under any unregistered instrument, or interested as a judgment creditor, or otherwise howsoever" in property of which the title is already registered to be notified of any dealing by the owner which may be presented for registration. The effect of a caution is that during its subsistence no such dealing can be made complete by registration until the cautioner has had an opportunity of challenging the right of the owner to deal with the land as he has tried to do, or of challenging his right to deal with it without recognizing the claim of the cautioner. There is nothing in the Act to suggest that the caution gives constructive notice of the claim, right or interest to which it relates and it certainly does not confer any kind of priority. Furthermore, it does not prejudice the claim or title of any person and has no effect whatever except as stated in the Act.

(*b*) See generally, ss. 54 to 56; rr. 215 to 222, and schedule, forms 13, 14. A caution against dealings must not be confused with a priority caution, which regulates priorities between incumbrancers of life interests and certain future interests and which does not concern persons dealing with the legal estate in registered property.

It is customary and proper to use a caution only when the owner will not lend his assistance to an application for the protection of the rights of a third party by consenting and by lodging his land certificate at the Land Registry. However, the palpably hostile nature of the caution is the very thing that recommends it as an apparently powerful weapon to some people. Any such person should not be deluded, however, but rather, he should beware that undue aggressiveness does not land his client in a claim for damages (see section 56 (3)). He should, besides, remember that a caution has but little stability for, as will appear, it is easily got rid of by being warned off.

What interests can be protected by a caution? The Act refers (in section 54 (1)) to an interest in land under an unregistered interest, or that of a judgment creditor, or one arising " otherwise howsoever." As a matter of construction, the last two words cannot, of course, be limited to interests *ejusdem generis* with any foregoing because there is no *genus*. But the interest must be one in *land* and hence the better opinion appears to be that equitable interests arising under a strict settlement or one upon trust for sale that are capable of being overridden and of attaching to proceeds of sale are excluded. This is reasonable, for not only can all such equitable interests be adequately secured by a restriction but there is a somewhat similar exclusion in regard to unregistered land (*Cf.* Land Charges Act, 1925, s. 10 (1), class C (iii)). In other words, a distinction must be drawn between an equitable interest, and an equitable interest in land (see *Stevens* v. *Hutchinson and Another* [1953] 2 W.L.R. 545).

In order to be cautionable—for such is the recognised jargon—an interest must be one which the court will enforce. The Land Registration Rules, 1925, point out a few examples of a cautionable interest with greater particularity than the Act. Thus the claimant may allege that he is entitled as beneficial owner in fee simple, as a person beneficially entitled to a lease, as a tenant for life under the Settled Land Act (presumably, as a general rule, in his capacity as the fiduciary owner who is entitled to have the legal estate vested in him, rather than as the beneficial owner entitled to an interest for life), as a purchaser under a contract, as plaintiff in an action in the Chancery Division, or as equitable mortgagee by virtue of a charge under hand. It must not be deduced from the reference to a purchaser that every intending purchaser, mortgagee or lessee needs to caution. The same practice that in unregistered conveyancing limits the registration of an estate contract under the Land Charges Act to sales in which completion may be long delayed or where the good faith of the disponor is in doubt may be applied.

Certain matters of a hostile character that in the case of unregistered land would be registrable under the Land Charges Act may appropriately be protected by a caution against dealings as, for example, any pending action concerning registered property, or a deed of arrangement affecting it. The equitable charge in right of an unsatisfied judgment debt which, in unregistered conveyancing, only comes into operation after a writ or order for the purpose of enforcing it has been registered under the Land Charges Act at Kidbrooke (*Cf.* Law of Property Act, 1925, s. 195 (3) proviso (i)), can be brought into being by means of a caution so far as registered property is concerned (Land Registration Act, s. 59 (3)). Moreover, any creditor, on behalf of himself and all other creditors, or the Official Receiver or trustee in bankruptcy, may lodge a caution against any registered proprietor against whom a receiving order has been made in respect of any minor interest affecting the registered land (section 61 (10)) (*c*).

It is beyond question that the only generally accepted method of protecting the rights of persons interested in settled land or land held upon trust for sale is by restriction (see sections 58 and 86 (3)), but a beneficiary is nevertheless allowed to apply for a caution at his own risk (r. 57). When an infant becomes entitled, a caution may be lodged in his name or on his behalf by his parent, trustee or guardian (section 111 (4)). Then again, a person intending to apply to the court for the appointment of a special or additional personal representative of a deceased proprietor may caution (section 41 (2)). However, it is expressly provided that no entry except a caution against dealings with the entirety may be made as respects the title to an undivided share (section 78 (4)).

The interests and claims mentioned above are not the only possible ones that may be protected by a caution. However, there are limits to the classes of persons who may apply as well as to the matters that may be protected in this way. For example, a person whose estate, right, interest, or claim has already been registered or protected on the register by a notice or a restriction is not entitled (except with the consent of the Chief Land Registrar) to lodge a caution in respect of such estate, right, interest, or claim. Again, seeing that the declared effect of a person being registered as first proprietor of freehold or leasehold land with absolute or good leasehold title is to exclude from recognition or effect all estates and interests that do not appear on the title and are not of the class known as overriding interests (see, *e.g.*, section 5), it is

(*c*) For the normal methods of protecting rights of creditors, see *sub nom.* "Inhibitions," *post.*

impossible, if consistency is to be maintained, to allow a third party to use a caution for protecting matters arising before the date when such a title was granted. But this principle does not exclude the registration of a caution to prevent a possessory title from being converted to absolute or good leasehold, or to prevent a good leasehold title from being converted to absolute title. The procedure is seldom used, yet in the nature of things it is likely that the cautioner's interest in such a case can only be one arising before first registration.

Nothing has so far been said of the right of a person who is interested in a registered charge to lodge a caution to prevent any dealing with that charge without his knowledge. The foregoing observations apply to such a right *mutatis mutandis*. In particular, it may be noted that the Chief Land Registrar will not allow a mortgage of an undivided share in proceeds of sale to be protected by a caution, nor is it normally easy or possible for the registered proprietor to prove that he has a cautionable interest in a charge to which his estate is subject.

A mortgage or a legal charge by deed may itself be protected by a caution in a specially prescribed form, known as a mortgage caution, but nothing need be said about this except that the procedure is expensive, extremely cumbersome, inconvenient to everyone concerned with it and, seeing this device was invented only as a sop to archaists, that fortunately it has now almost disappeared into the mists of obsolescence. Actually, although section 106 of the Act, which deals with the mortgage caution, provides, in effect, that a mortgage by deed may not be protected by the ordinary caution, there may be circumstances of hardship in which the Chief Land Registrar would be prepared to accept such a caution. But, of course, the prudent practitioner will always prefer to apply for substantive registration of a charge so that his client may enjoy to the full all the powers of a legal mortgagee.

When an interest that has been protected by a caution is transferred to another person the benefit of the caution cannot be transferred on the register. Instead, the original caution must be withdrawn, and a fresh caution applied for.

Cautions : The Procedure

A cautioner is not required to produce the land certificate—indeed, the contentious nature of his action presupposes that it has not been made available to him by the proprietor. But his caution must be supported by a statutory declaration, made by him or by his solicitor, which must point to the interest which is to be

protected as being one that is binding on the registered proprietor. This will be obvious where, for example, privity of contract between the cautioner and the proprietor is alleged to exist. It may not be clear, however, in cases where the only privity between them is that of estate. Thus, a sub-purchaser of registered land must, besides referring to his own contract, establish a connection with the registered proprietor by declaring that his vendor has agreed to buy from the person, naming him, who appears on the register as owner. If an application for a caution were palpably ill-founded it would, no doubt, be refused by the Chief Land Registrar.

As a matter of courtesy the Chief Land Registrar informs the registered proprietor of the registration of the caution, but this need not spur him into action immediately, for the caution does not prejudice his title, or the claim or title of any other person. Its effect is that thenceforth the Chief Land Registrar must not, without the consent of the cautioner, register any dealing or make any entry on the register for protecting the rights acquired under a deposit of a land certificate or charge certificate or other dealing by the proprietor with the land or charge affected by the caution until he has served notice on the cautioner, warning him that his caution will cease to have any effect after the expiration of (usually) fourteen days next following the date at which such notice is served. However, the proprietor of the land or of a charge to which a caution relates may at any time ask the Chief Land Registrar to serve a similar warning-off notice. After the expiration of the time stated the caution will cease if the cautioner does not answer the notice unless an order to the contrary is made by the Chief Land Registrar, and upon the caution so ceasing it will be cancelled and the registered land or charge may be dealt with in the same manner as if the caution had never been lodged.

The caution may, of course, be cancelled at any time in pursuance of an application signed by the cautioner or his personal representative, or his solicitor, but any liability of the cautioner previously incurred to indemnify or make compensation to anyone who may have sustained damage through his unreasonable action is not thereby affected. It is safe to say that a cautioner could not be accused of unreasonableness if his interest was one that could properly be protected under the Land Charges Act in the case of unregistered property.

If the cautioner considers that his rights are sufficiently protected, he may consent to the dealing in respect of which notice was served on him. Consent, which is often indicated informally

by letter, may be given on terms. It is unwise to consent conditionally without weighing what the results of doing so may be. Suppose, for example, that P, the proprietor, agrees to sell to C and, as completion is to be deferred for three years, C applies for a caution. Later, P executes a charge in favour of M and when M applies for it to be registered the Registry, as it is required to do, serves notice on C. Should C consent to the dealing being registered on condition, say, that his own caution be allowed to continue? The danger in doing so lies in the fact that his caution will not bind M nor will any disposition by M bring the caution into operation. Consequently, if P defaults under the charge and M exercises his power of sale, a purchaser from him will take entirely free from C's interest. It would be otherwise if, before the registration of the charge in favour of M, C had protected his contract by notice. In an example like this, which incidentally illustrates the inferiority of a caution to the protection afforded by notice, C's best course might be to consent to the registration of the charge on condition that his own contract is noted on the title with priority thereto. This could be done if the other parties agreed.

But assuming the caution does not become exhausted by effluxion of time, and that the cautioner does not consent or withdraw his caution, the Chief Land Registrar will, on being satisfied that the cautioner has a prima facie claim, determine the rights of the parties summarily. Although he possesses power to cancel a caution without hearing the interested parties he is not given power to allow it to continue, after it has been warned off, without such a hearing. Obviously, he will not cancel a caution if the cautioner has made out a prima facie case in his statutory declaration. Hence, unless the caution is got rid of by withdrawal or consent, the cautioner's next step, after receipt of the warning-off notice, is to show cause why the caution should continue to have effect, or why the proposed dealing should not be registered. Thus he might show that the dealing was obtained by fraud or mistake, or that it is inconsistent with a prior dealing, or that it conflicts with his adverse right or his minor interest which would not be overridden if the land were not registered. Cause may be shown by the cautioner delivering a statement in writing, signed by him or his solicitor, setting out the grounds of his claim. Assuming there is a case to answer, the Chief Land Registrar will send a copy of the cautioner's statement of objection to the solicitor acting for the person who seeks removal of the caution and invite a reply thereto. On receipt of this reply he appoints a time for the proprietor and the

cautioner or his personal representative and any other person he may deem expedient to appear before him. Parties may appear either in person or by counsel or solicitor.

After hearing all such persons and serving such notices as he thinks necessary, the Chief Land Registrar will make such order as he thinks just. He might, for example, order that the caution continue to have effect, or that it be cancelled, or that the registration be refused either with or without an inhibition against registration at any future time, or that it be completed forthwith, or after an interval, or that it be completed conditionally or with some modification, or subject to the prior registration of a dealing in favour of the cautioner, or subject to some notice, condition, restriction, or inhibition being entered.

At any stage of the proceedings, the Registrar, if he is in doubt, may refer the matter or any question arising on it for the decision of the court, by ordering a party to take out an originating summons under R.S.C., Ord. 55, r. 14A. Moreover, any person aggrieved by any decision of the Registrar in relation to a caution may appeal to the High Court by means of an originating summons issued under Ord. 54D, r. 6.

On learning that a caution exists, the solicitor acting for a purchaser or other disponee should invite the registered proprietor's solicitor to apply to the Registry for service of a warning-off notice without delay. In no circumstances should a purchaser go to completion whilst a caution subsists unless he knows with certainty that he will be handed a withdrawal or a satisfactory consent signed by the cautioner or by his solicitor.

The caution procedure involves the service of written notices by post, and a short explanation of the rules governing this subject may be of interest (*d*). All these notices are sent by the Land Registry by registered post to the addresses for service given on the register, of which a cautioner is entitled to have up to three. One of his addresses may be that of his solicitor and any alteration of address may be noted without fee. Notices which call for an answer or an objection invariably state the time (usually 14 days) that will be allowed for a reply and point out what the consequences of ignoring it may be. Seven further days are always allowed for the time the letter is deemed to be in the post, so that a minimum period of 21 days elapses before any further action is taken. Meanwhile, any undelivered mail is returned to the Registry through the dead letter office so that the Chief Land Registrar may judge

(*d*) This paragraph summarises some of the provisions of s. 79 and rr. 218, 221 and 311 to 315.

whether it is proper for him to proceed with the matter. From these facts it will be apparent that whether the cautioner is at home or on holiday, and whether or not he moves house, and even if he lives a nomadic existence, he is enabled to safeguard his rights to the full. But if he fails to make adequate arrangements in this respect or omits to tell the Land Registry of any change of his address he has no one but himself to blame (except, possibly, his solicitor) if important communications do not reach him or his legal adviser.

Restrictions (*e*)

The writer remembers hearing a question asked by a lawyer who was either ignorant of the principles of registered conveyancing, or else being unnecessarily oblique. "Why," he asked, "should you have restrictions over registered property but not over unregistered?" The academic answer is that restrictions are necessary in registered conveyancing because, under the simplified presentation of the facts about ownership on a registered title the person or persons or body whose names appear on the register as owners are deemed, subject to any entry to the contrary, to possess plenary powers of disposition without any hindrance. Therefore, when persons or corporations whose powers of dealing with land are, by general law, limited or subject to control, become registered as proprietors, it is necessary to rebut, in a readily apparent manner, the normal statutory implication of unfettered ability. Another answer to the question is that restrictions exist in unregistered conveyancing and in registered conveyancing alike—but under the former system they are invisible, being written in the mind of the practitioner. Under the registered system some of the practitioner's thinking is done for him by the Chief Land Registrar and in some instances restrictions summarise the result.

A solicitor whose client is lending money to a limited company upon the security of unregistered land must often do far more than merely carry out a routine investigation of the paper title. He must satisfy himself that the corporation has power to borrow and to hold land, either in limited or unlimited quantities; that its objects are not charitable, or if they are, that necessary consents have been obtained; that the company is not in, or about to go into, liquidation; the method of sealing; that there are no floating securities which might crystallise to the prejudice of his client's loan; and that there are no earlier charges of any kind that might displace him in priority. These questions are some of the many

(*e*) See generally, ss. 58, 86 (3); rr. 39, 56 to 58, 99 to 102, 104, 170, 171, 213, 214, 235 to 237.

that may vex him, but in registered conveyancing a restriction in the proprietorship register will show instantly whether, and on what conditions, the owner company can borrow and inquiries *aliunde* are unnecessary. He can be sure that the company as registered proprietor has full powers of absolute ownership unless the register indicates the contrary. Furthermore, bearing in mind the predeterminate effects of an official search under the Land Registration Rules of 1930 and 1936, the lender's solicitor can have certain knowledge about the priority of his client's charge (section 29), and, in particular, he can be confident that no charge, debenture, trust deed or similar incumbrance created by the company can prejudice his client unless it is actually protected on the register (section 60).

Again, in unregistered conveyancing a solicitor whose client is buying settled land or land held upon trust for sale must be careful to ascertain, amongst a number of other things, who the trustees are and to pay the purchase money to not fewer than two of them unless there is a trust corporation acting. In addition, as every practitioner knows to his cost, many titles in general conveyancing are confused by the introduction of intricate equities which, despite the design of the Birkenhead legislation, some nervous person has previously brought to the front of the curtain. However, if his client is a registered owner there will be a restriction in the proprietorship register to jog his memory on the only material point, and which will identify the payees for him.

These are simple cases, but situations can arise that are complex and even obscure, where the fact that the Chief Land Registrar has previously assessed the true extent of the proprietor's powers and has entered an appropriate restriction indicating what these are, saves someone who subsequently deals with the proprietor both effort and time. No doubt, the authoritativeness and conclusiveness of restrictions relating to such matters as charities, benefices or smallholdings have been a source of comfort to some busy practitioners.

Special restrictions

Most restrictions, then, are entries on the register of title that restrain or limit the prima facie wide powers of disposition of a registered proprietor. More often than not they serve to protect the equitable interests of beneficiaries that lie behind the impenetrable curtain of the registered estate, but this kind of restriction is not, strictly speaking, germane to the present discussion. Nevertheless, there may be occasions on which a restriction is used to perform the kind of function which, in unregistered conveyancing, devolves upon the Land Charges Act. By the terms of section

58 (1) of the Land Registration Act, where a proprietor desires to place restrictions on transferring, or charging, or disposing of, or dealing with, his registered property in any manner authorised, or on the deposit by way of security of any certificate, he may apply for the entry of a restriction that no transaction shall be effected unless certain specified things are done. Thus he might seek to restrain the registration of a disposition unless notice of it is first transmitted by post to such address as he specifies, or unless the consent of some person named by him is first given to the transaction, or unless some such other matter or thing is done as required by him and approved by the Chief Land Registrar. All this, of course, implies consent on the part of the proprietor. He is deliberately whittling down his prima facie powers in favour of someone.

These provisions permit the entry of a restriction to protect (for example) an annuity or a contract for sale. The wording of most restrictions confines the restraint to a particular transaction, or to a particular class of transactions so that, unlike cautions, they do not come into operation in relation to every conceivable kind of application that is made. However, the experience of a quarter of a century suggests, not that the use of a restriction to protect certain of the rights which, in unregistered conveyancing, would be subject to the Land Charges Act is necessarily forbidden, but that it is not usually a convenient or suitable method of protection. But a restriction can appropriately be used to protect an equitable charge which is liable to be overriden by a sale and hence, perhaps, ought not to be protected by notice.

There is one unqualified prohibition on the use of restrictions. They do not extend or apply to dispositions of or dealings with minor interests as, for example, an assignment of a remainder, or a mortgage of an executory interest, which cannot, under any circumstances, be made to concern a purchaser of registered property.

It is noteworthy that restrictions are always framed to include the saving words, "except under an order of the Registrar," or words of similar import. In practice it is usually possible to comply with the terms of a restriction without asking for such an order. Nevertheless, it is occasionally useful to be able to seek the Chief Land Registrar's guidance about circumstances of legal complexity. More important still, if, for example, the person whose consent is requisite has died or disappeared, the Registrar can be asked to create a way out of an impasse where the only alternative would be the expensive one of going to the court. It is also to be

noted that the Registrar cannot be compelled to enter any restriction that he deems to be unreasonable or calculated to cause inconvenience because it conflicts with the established principles which regulate the keeping of the register. This, when all is said and done, is a sane proviso for he is an unchallengeable expert on the question of the smooth running of the machinery of registration, and it is his duty to facilitate the conduct of business (section 127).

A restriction does not, like a caution, become exhausted through being invoked, nor is it necessarily removed as a matter of course when a purchaser is registered. Restrictions such as those which have been entered under a statutory obligation and concern settled or charity land or property held upon trust for sale, or those relating to the limited powers of corporations, are cancelled on an outright sale without application and without fee provided, of course, their terms have been complied with. But restrictions which, for example, have been entered in pursuance of a special application to forbid a disposition without the consent of a named party cannot be removed unless an application for withdrawal is made. This may be done by letter, but must be signed by all persons appearing by the register to be interested in the restriction, or their solicitors. Only in the last resort should the Chief Land Registrar be asked to make an order under a restriction.

Inhibitions (*f*)

An inhibition is more powerful in effect and more enduring than a restriction, but one is rarely granted except in relation to bankruptcy.

The High Court, after hearing such persons it thinks expedient, has power to issue an order inhibiting for a time, or until the occurrence of an event to be named, or generally until further order, the registration or entry of any dealing with any registered land or a registered charge. The Registrar may also inhibit the registration of dealings by an entry on the register upon the application of any interested person made in the prescribed manner and after a hearing if he thinks fit. He is required to register an inhibition automatically in respect of a receiving order in bankruptcy made against a proprietor, and this has the effect of preventing the registration of any disposition or transmission until the trustee in bankruptcy is registered as proprietor.

It might be desirable for a person who has been defrauded to apply for an inhibition before taking any other step, or, if proceedings have been commenced, to ask the court for one by way of

(*f*) See generally, ss. 57, 61 (3); rr. 180, 230, 231.

interlocutory relief. The High Court or (subject to appeal) the Registrar may, in lieu of an inhibition, order a notice or restriction to be entered, or may refuse to make any such order or entry and annex thereto any terms or conditions thought fit, and may discharge any such order or cancel any such entry when granted, with or without costs, and generally act in the premises in such manner as the justice of the case requires. Any person aggrieved by an inhibition may apply to the Registrar for its removal if he entered it, but if it was entered by the order of the court it can only be removed by a similar order.

The inhibition, when it exists, provides a most useful warning of danger in a manner unknown in unregistered conveyancing. No prudent practitioner would ever consider dealing with a registered title in defiance of its terms.

NOTICES (*g*)

Little need be said about the use and effect of notices entered on the register when it is explained that in registered conveyancing they perform the function of notifying incumbrances and other facts of title that, under the unregistered system, are disclosed partly in the abstract of title, partly in the latest conveyance or other deed and partly by the registration of land charges—and, occasionally, other matters too—under the Land Charges Act.

The entry of a notice is the normal method of disclosing and protecting all incumbrances (other than legal mortgages) subsisting at the time of first registration, leases or sub-leases created by the proprietor, perpetual or terminable rentcharges, the severance of mines and minerals, the existence of easements and other overriding interests, or the fact that land is free from them, and most land charges. Local land charges are always registrable in the first instance with the local authority and normally they are not protected on the register of title. But before a land charge or a local land charge which secures money and which affects registered land is realised, it must be registered as a registered charge. This enables the proprietor of the charge to exercise all the rights and remedies of a legal mortgagee (section 34).

Particular mention must be made of the protection, by notice, of a lien created by the deposit, or the intended deposit, of a land certificate or a charge certificate. If the depositee applies for the

(*g*) See generally, ss. 40, 48 to 52, 61 (1), 70 (2) (3), 73: rr. 40, 41, 46, 107, 186 to 212, 239 to 246.
The table on pp. 122–123, *post*, gives some details of many matters protectable by notice.

fact of the deposit to be noted on the register, the entry, when made, operates not only as an effectual notification of the lien but also as a caution that requires to be warned off or withdrawn before other dealings can be registered.

In addition to many matters that are expressly referred to as being protectable by notice, the method may be used for "any other right, interest or claim which it may be deemed expedient to protect by notice instead of by caution, inhibition or restriction" (section 49 (1) (f)). But a notice may not be registered in respect of any estate, right or interest that can be overridden by the owner under a strict settlement or one upon trust for sale because a restriction is the appropriate mode of safeguarding the beneficiary's rights. Nor will the Chief Land Registrar clutter a title with notice of any liability, right or interest of a trivial or obvious character or one of which the entry may cause confusion or inconvenience. For example, a note that the owner is entitled to use a road and the sewers under it when both have been taken over by the local authority is not only without value to anyone but it helps to destroy the simplicity of the register.

The party entitled to the benefit of, or interested in, a right is the proper person to apply for notice to be entered, but he cannot proceed without the tacit consent of the registered proprietor, which is evinced by his lodging his land certificate at the Land Registry or by his handing it to the claimant to enable notice to be entered on it (section 64 (1)). Usually, it is the failure to obtain the proprietor's concurrence that prompts a claimant to apply for a caution. Nevertheless there are important instances in which the Chief Land Registrar automatically notes on the register some estate, interest or right. Such is the case, at the time of first registration, in regard to all existing incumbrances and all adverse easements, rights and privileges created by an instrument or sufficiently proved to exist. Such is also the case, after first registration, with any lease or rentcharge as to which the lessee or rentchargee applies for substantive registration of his title; with restrictive covenants or easements created by a transfer that is presented for registration; with all death duties; and with the rights of creditors when a petition in bankruptcy has been presented by or against a registered proprietor. In none of these cases is it necessary for any application for the entry of notice to be made.

On the other hand, one case in which it is specially necessary to remind the practitioner of the need to apply for the entry of notice is that in which incumbrances are created by a company registered under the Companies Acts. When such a company buys

registered land, or takes a transfer of a registered charge, and also, presumably, where it lends money on the security of registered land (*h*) the Chief Land Registrar is not concerned with any mortgage, charge, debenture, debenture stock, trust deed or other incumbrance, whether fixed or floating, created or issued by the company, despite the fact that it may have been registered at the Companies Registry, unless it is also registered or protected under the Land Registration Act. As the Registrar is not concerned, nor *a fortiori* is a purchaser. These statements are reinforced by a provision that no indemnity is to be payable out of the Land Registry insurance fund by reason of a purchaser acquiring any interest under a registered disposition from the company free from an incumbrance of any of the kinds mentioned (section 60). If a charge constitutes a legal charge of registered property it is desirable that it should be the subject of substantive registration under section 26 of the Act, so that the chargee can exercise the powers of a legal mortgagee.

Effect of Notices

Every disposition by the registered proprietor takes effect subject to all estates, rights and claims which are protected by way of notice on the register at the date of the registration or entry of notice of the disposition. But this holds good only if and so far as the estates, rights, and claims in question are valid ones (*k*) and are not (independently of the Land Registration Act) overridden by the disposition. A disponee for valuable consideration takes free from all such matters as are capable of being protected on the register but which are not protected. If a mere notice of a claim is entered on the register, it will operate by way of notice only. It cannot render the claim a valid one whether it was made adversely to, or for the benefit of, the registered land or charge.

Clearly, in the ordinary way a purchaser or other disponee need not take any action about entries by way of notice of which he learns because they will continue to affect his estate. If his contract of purchase has been protected by notice the entry will be

(*h*) s. 60 of the Act states: "Where a company . . . is registered as proprietor of any estate or charge already registered, the Registrar shall not be concerned. . . ." But it is sometimes unwise to pay too much attention to the *ipsissima verba* of a statute. Clearly, in this instance, unless the whole principle of the section is to be undermined through adherence to the literal meaning of a loose phrase, this wording should be construed as meaning: "Where a company . . . is registered as proprietor of any estate in, or any charge upon, land already registered, the Registrar shall not be concerned. . . "

(*k*) *Cf. Cator* v. *Newton, Bates, third party* [1940] 1 K.B. 415 (C.A.).

cancelled automatically when he is registered. Again, a purchaser for value should not concern himself about an entry as to death duties, for it will be removed under the machinery of section 73 of the Act without any action on his part. But if he is buying from a company that has created a floating charge which is noted as an incumbrance he should demand, at completion, a certificate signed by the company's solicitor that none of the events which would cause the charge to crystallise has occurred, for the Chief Land Registrar will not cancel the entry without some such evidence.

Conclusion

The writer has sought to demonstrate that (except in regard to local land charges) any suggestion that the Land Charges Act applies to registered property (*l*) is entirely false, for any instrument or matter that can be protected in one of the five registers kept at Kidbrooke can be equally well protected by notice, restriction, caution or inhibition. Indeed, the field covered by the latter devices in the case of registered property is far wider than that to which the Land Charges Act applies, and the fact that up to four alternative methods of protection are provided means that a claimant can choose one that is peculiarly appropriate to the particular circumstances as, for example, the temporary or the lasting nature of the right or interest, or the presence or absence of contention between the parties.

So far as a purchaser is concerned, the register not only sets out an unequivocal précis of the interests and incumbrances subject to which he will take the land, but also, when needful, gives an indication of the action he ought to follow before paying over his money. Furthermore, he can freeze the register in his favour with an official search. And not only need he never search at Kidbrooke but, so long as he is not party to a fraud, he is no way concerned with any instrument, matter or claim which is protected there but not protected on the register of title, whether he has express, implied, or constructive notice of it (*m*). The Land Registry's internal machinery that achieves these helpful and reliable results is complex, but this does not affect those using the system. So far as they are concerned it operates to make their task as smooth and as simple as possible.

(*l*) *Cf. City Permanent Building Society* v. *Miller* [1952] 2 All E.R. 621, 626.
(*m*) See particularly ss. 59 (6), 110 (7).

REGISTRATION MACHINERY REPLACING THAT OF THE LAND CHARGES ACT

Instrument or matter (as defined in the Land Charges Act, 1925)	Normal method of protection against registered land	Other possible alternative methods. (The list is not exhaustive)	References (Land Registration Act, 1925)
Pending action relating to land.	Caution.	Inhibition if the court so orders.	ss. 59 (1), 54, 57.
Petition in bankruptcy.	Creditor's notice (entered automatically by Chief Land Registrar).	Does not arise.	ss. 59 (1), 61 (1).
Writ or order for enforcing judgment against land.	Caution.	In practice, none.	ss. 59 (1) (3), 54.
Receiving order in bankruptcy.	Bankruptcy inhibition (entered automatically by Chief Land Registrar).	Does not arise.	ss. 59 (1), 61 (3).
Deed of arrangement affecting land.	Substantive registration of the trustee as proprietor pursuant to a transfer.	Caution	ss. 59 (1), 54
Land charges—Classes A and B.	Substantive registration of the charge.	Notice or caution.	ss. 26, 49 (1) (c), 59 (2), 54.
Puisne mortgage. (Probably all legal mortgages and charges in registered conveyancing are of this character.)	Substantive registration of the charge.	Any of the other methods used for protecting a legal mortgage.	ss. 26, 59 (5).
Limited owner's charge.	Caution or restriction.	Presumably a notice cannot be used as the charge can be overridden.	ss. 49 (1) (c), 49 (2), 54, 58 (1).
General equitable charge.	Notice.	Caution or restriction.	ss. 49 (1) (c), 59 (2), 54, 58 (1).
Estate contract.	It is usually considered that no protection is necessary if possession is to be taken soon.	Notice, caution or restriction.	ss. 49 (1) (c), 59 (2), 54, 58 (1).
Inland Revenue charge for death duties.	Notice (entered automatically by Chief Land Registrar).	Does not arise.	ss. 73, 59 (5).

Instrument or matter (as defined in the Land Charges Act, 1925)	Normal method of protection against registered land	Other possible alternative methods. (The list is not exhaustive)	References (Land Registration Act, 1925)
Restrictive covenant.	Notice (entered automatically by Chief Land Registrar if created before first registration or by a transfer of registered land).	None.	s. 50.
Release or modification of restrictive covenant.	Notice.	None; unless the effectiveness of the release, etc., is strictly proved, when the original entry may be cancelled.	ss. 40, 50.
Equitable easement.	Notice.	Caution.	ss. 49 (1) (c), 70 (1) (a), 59 (2), 54.
Land charge—Class E.	Notice, provided the annuity cannot be overridden.	Caution or restriction.	ss. 49 (1) (c), 49 (2), 59 (2), 54, 58 (1).
Land charge, securing money created by company.	Substantive registration of the charge, if a legal charge, otherwise notice. Registration at the Companies Registry alone is not sufficient.	Any of the other methods used for protecting a legal mortgage if it is such; caution.	ss. 26, 60, 49 (1) (c), 54.
Local land charges securing money.	None; they are primarily registrable in the local registers.	Substantive registration of the charge if it is to be realised.	ss. 59 (2), 26.
Other local land charges.	None.	Notice.	ss. 49 (1) (c), 3 (ix).

WITHDRAWAL AND WAIVER OF NOTICES

By A. Kiralfy, Barrister-at-Law

A problem is sometimes encountered in practice where one party has served some form of notice on the other, and, after negotiations, purports to withdraw or waive this notice. It may be in the interests of the other party to insist on the effectiveness of this notice, even though it has been thus withdrawn. The principles on which the revocation or waiver of a notice is permitted depend on the particular type of transaction.

(1) Notice to Quit, Served by a Landlord on a Tenant

(A) *Valid Notices*

Here the position appears to vary, depending on whether the notice to quit is effective in law or not. Assuming that the notice is *effective* it cannot be unilaterally withdrawn. This depends on the fact that notice is an incident of a periodic tenancy, rebutting the presumption of renewal. As Somervell L.J. put it in *Leek & Moorlands Building Society* v. *Clark* [1952] 2 All E.R. 492, at 495, "A periodic tenancy continues from period to period unless the notice agreed or implied by law is given . . . a periodic tenancy renews itself unless either side bring it to an end." For a long time there was little authority on this point. As Younger L.J. put it in *Freeman* v. *Evans* [1922] 1 Ch. 36, at p. 48, "Whether such a transaction amounts to a new tenancy or not is generally of little or no importance to anybody and that may account for the absence of authority upon the point." Cases involving guarantees have, however, made the point relevant, and it has been held that the original surety under a tenancy agreement is discharged if the lessor serves and later withdraws notice to quit (*Tayleur* v. *Wildin* (1868) 3 Ex. 303). It has also been held to be a breach of a covenant against underletting if a tenant withdraws notice to quit which he has served on an under-tenant, where, for some reason, the landlord did not take action at the time of the original underletting (*Freeman* v. *Evans*, *supra*).

These cases make it clear that the withdrawal cannot be unilateral. The withdrawal is treated as a new offer of a tenancy,

which must be accepted by the tenant to be effective. If there is no agreement then there is no new tenancy. The principle is abundantly established by authorities. Thus Kelly C.B. in the leading case of *Tayleur* v. *Wildin*, *supra*, stated, "It is clear that, whether the notice to quit is given by the landlord or a tenant, the party to whom it is given is entitled to insist upon it, and it cannot be withdrawn without the consent of both. If that is so, then the consent of the parties makes a new agreement, and if there is a new agreement there is a new tenancy created to take effect at the expiration of the old tenancy." This principle was echoed by the Court of Appeal in *Freeman* v. *Evans*, *supra* ("As *Tayleur* v. *Wildin* has stood for so long without being disapproved of, and has found its way into the textbooks, and has no doubt, as Brett L.J. said, been acted upon for a great number of years, and as it has been before the Court of Appeal in England and has never been in any way doubted or criticised by that court, I think we ought to act upon it").

There is little authority on the degree of consent by the tenant which will make the withdrawal of a notice to quit effective. Woodfall (Landlord and Tenant, 24th ed., 980) says that "implied consent" of the tenant is enough. Certainly it is very common to construe an informal occupation as a tenancy where rent is paid, and any act by the tenant showing that he regards himself as tenant would seem to validate the withdrawal of the notice. A tenant who wishes to rely on the notice should therefore be unequivocal in showing that he considers the tenancy to be at an end.

The textbooks draw a distinction between cases where notice to quit is withdrawn during its currency or after its expiration, but it is not easy to see what the practical difference is. In both cases a new tenancy is created, and in neither case would the new tenancy arise before the end of the original tenancy (Woodfall, *op cit.*, *supra*; Foa, Landlord and Tenant, 7th ed., 607; Halsbury, Laws of England, Hailsham ed., Vol. 20, para. 153). The effect seems to be the same where the notice has expired, as in *Davies* v. *Bristow* [1920] 3 K.B. 428, *per* Lush J., at 438, as it is where it is withdrawn before its expiration (*Tayleur* v. *Wildin*, *supra*). There may be occasions when there is some relevancy in the distinction, *e.g.*, as to dates of liability, or conflicting priorities of tenancies. The point can only arise in the case of periodic tenancies and for the notice to be valid it cannot expire prematurely. Thus, if six months' notice is served on a yearly tenant, and withdrawn by agreement, on new terms, the new tenancy seems

only to arise at the end of the six months' period (*Tayleur* v. *Wildin*, *supra*, *per* Bramwell B.). This rule, followed in the text-books, does not take into account the possibility of an immediate new tenancy, treating the original tenancy as surrendered by operation of law, which is encountered in modern cases (see Pollock, The Implied Surrender of Leases, *ante*, Vol. 16, p. 436).

(B) *Invalid Notices*

If notice to quit is *invalid* it does not terminate the tenancy and the above rules will only apply as and when a valid notice is served. This was brought out in the case of *Holme* v. *Brunskill* (1877) L.R. 3 Q.B.D. 493 (C.A.). Here the landlord served notice to quit on November 9, 1875, stated to expire on April 10, 1876, or on the expiration of the year of Brunskill's tenancy. The notice was served less than six months before April 10, 1876, and was ineffective for that year, but, owing to the other words in the notice, was effective on April 10, 1877. The notice to quit was later withdrawn. The tenant became insolvent before April 10, 1877, and the surety under the original tenancy agreement was held liable. Cotton L.J. pointed out that the original term of the tenancy had not yet expired. That tenancy had not yet been effectively terminated. Negotiations before April 10, 1876, would not create a new tenancy as from that date but only from the date of effective termination of the original tenancy by a valid notice. In *Freeman* v. *Evans*, *supra*, Warrington L.J. said that *Holme* v. *Brunskill*, *supra*, had distinguished *Tayleur* v. *Wildin*, *supra*, " on a real and substantial ground."

Acceptance of an invalid notice to quit does not endow it with any validity. This was brought out in the case of *Hankey* v. *Clavering* [1942] 2 K.B. 326 (C.A.). In this case either party had power to " break " a 21-year lease at the end of seven years. The landlord served notice, to expire on December 21, 1941, whereas the proper expiry date was December 25, 1941. The tenant's solicitor acknowledged receipt of the notice without any objection. The Court of Appeal held that the notice was ineffective and that it was incapable of achieving the desired legal effect, regardless of the tenant's reaction to it (*cf.* Foa, Landlord and Tenant, 7th ed., p. 583).

A person serving a bad notice to quit is not precluded by that from denying its invalidity (Halsbury, Laws of England, Hailsham ed., Vol. 13, p. 509, para. 576). This rule is laid down in *Re Bebington's Tenancy* [1921] 1 Ch. 559, at p. 565. Peterson J. said, " It seems to me to be established further by the authorities

to which I have been referred, that a man who gives a bad notice, that is, a notice which does not operate as a defeasance of the estate of the tenant, is not afterwards precluded or estopped from saying it is void. In one of the cases I have just referred to, a bad notice was given by the tenant, and the court acted on the view that, although the tenant had given the notice, he was free to say that it was invalid. Therefore the position is that the defendant gave a bad notice and that the tenant was not at any time in a position to act with certainty on the notice, inasmuch as it was always open to the defendant to say that the notice he had given was bad and inoperative." It has been held in Ireland that, if the other person acts upon such a notice to his detriment, the person serving it may be estopped from denying its validity: *Ashe* v. *Hogan* [1920] 1 Ir.R. 159.

Service of a second notice may amount to waiver of a first notice if it recognises the tenancy as still subsisting. A second notice does not, however, always imply such recognition. Thus, a demand for possession in a second notice is not inconsistent with determination of the tenancy by the first. Foa (*ubi supra* 608), states that there is no decided authority on the effect of the second notice if it is in itself invalid. It may leave an originally valid first notice in effect, but this is not so clear, as it may still imply waiver of the first notice at the time the second notice is served. The editors of Foa point out that the implied recognition of a tenancy as subsisting by service of a notice does not operate if the tenant is holding over "adversely" to the landlord under the Rent Restrictions Acts, since the landlord has no power to enforce his notice. No authority is cited for this proposition. Acceptance of rent in such cases will not amount to waiver, but this seems rather a different point.

(2) Notice of Re-entry and Forfeiture Served by a Landlord on a Tenant

The Law of Property Act, 1925, s. 146, requires the service of a notice of forfeiture before a landlord can forfeit a lease, and this applies to all breaches of covenant other than that to pay rent. Even in the case of arrears of rent notice of forfeiture may be served, but an action for possession is an alternative. In this part of the law acceptance of rent, distress, and various other forms of recognition of the tenancy are construed as waiving such notice. In *Ward* v. *Day* (1864) 5 B. & S. 359 (Exch. Chamber), a landlord distrained for rent and negotiated for a new lease after a forfeiture had been incurred. Erle C.J., at p. 362, said, "When

a landlord elects not to take advantage of a forfeiture, and declares to the party against whom he could enforce it that he will not do so, he is bound by that election. . . . The jury say that the plaintiff meant to waive the forfeiture. Having once done so he cannot be allowed to retract."

All the judges gave advice to the House of Lords in the case of *Croft* v. *Lumley* (1857) 6 H.L.C. 672. A tenant had tendered rent as rent and the landlord accepted it under protest, with knowledge that a forfeiture had been incurred. There was disagreement as to the effect of the particular facts but the opinions are interesting. Bramwell B., at p. 705, thought a landlord could elect either way or reserve his decision. Crompton J., at p. 713, said, "What is called a waiver is not so properly a forgiveness or a condonation or release of a breach of covenant as an election to take one estate instead of another. A receipt of rent *eo nomine* as rent under the lease, at least if unaccompanied by any explanation, is an unequivocal act of electing to keep the reversion; so is a distress, in cases where it can only be justified by the continuance of the tenancy."

A useful modern case is *Evans* v. *Enever* [1920] 2 K.B. 315. A landlord had two grounds for forfeiting a lease, the lessee's bankruptcy in July, 1918, and his falling two quarters in arrear with rent at the end of 1918. The landlord sued for possession in January, 1919, for failure to pay rent. The court granted relief to the tenant on terms of paying up the arrears. The landlord then sued for possession on the proviso against bankruptcy. Lord Coleridge J. held that he could do so. "There is," he said, at p. 320, "a series of cases which establish that if an action is brought for recovery of possession for breaches of covenant in the lease, that is an irrevocable election to determine the lease, and that no subsequent acts of the plaintiff can be relied on as qualifying that position." The payment of rent was no bar to the plaintiff landlord. "The claim for possession being met in that way, the plaintiffs' acceptance of the rent does not prevent them from relying in the later action upon the adjudication in bankruptcy, which took place before the rent accrued due."

These cases appear to apply to notices of forfeiture in the same way as actions for possession.

Continuing breaches of covenant involve a rather different principle. If a breach is continuing and capable of being made good, then acceptance of rent will not necessarily be construed as waiver. In *New River Co.* v. *Crumpton* [1917] 1 K.B. 762, a tenant broke a covenant to repair and the landlord served the statutory notice of

forfeiture, requiring repair within the three months. The landlord accepted rent which had accrued due after the expiration of the three months. When he sued for possession it was argued that he had waived the forfeiture. Rowlatt J. held that the original notice remained effective and no further notice need be served on the tenant. Acceptance of rent did not waive the right to forfeiture for continued failure to repair. The same principle was applied to a covenant against underletting in *Creery* v. *Summersell & Flowerdew & Co., Ltd.* [1949] Ch. 751. In that case there was a qualified covenant against underletting. The tenant corresponded with the landlord about being allowed to underlet but eventually went ahead without asking the landlord's consent. The landlord's agents sent a routine demand for rent a few days later. It was held, by Harman J., that this did not amount to waiver. The landlord did not even know what his agents were doing. In any case, the breach was a continuing breach. But some limitations are imposed on this case by the later decision of the Court of Appeal in *Downie* v. *Turner* [1951] 2 K.B. 112 where a lease contained covenants against underletting and against use for purposes other than a dwelling. The tenant underlet without consent in 1946. The landlord served notice to quit in 1947 and the tenant held over as a statutory tenant. In 1949 the landlord learned of the breach of covenant and accepted rent thereafter until 1950 when he sued for possession after serving a notice of forfeiture. He admitted he had waived the breach of the first covenant but tried to use the second covenant as a separate breach. His action was dismissed, as based on the same facts.

(3) Notices of Election in Property Matters

A good recent example of this case is *Re Shepherd* [1943] Ch. 8. A testator gave his son a life interest in certain property on condition the son settled certain property, coming to him from his grandfather, in such a way as to cut down his interest therein to a life interest. The grandfather left him property subject to a life interest in favour of his mother. The testator died. The son wrote to the trustees of both wills that he proposed to satisfy the condition in his father's will and settle the property accordingly. The widow of the testator then died. The son wished to take the property coming from his grandfather absolutely, rather than take under his father's will. It was held that he could do so. His election had not been irrevocable. No estoppel operated, since the persons who would be prejudiced (possible children of the son, taking in remainder under the projected settlement) had not acted on the notice to their detriment.

(4) Notice of Claim to Property

Clare Hall v. *Harding* (1848) 6 Hare 273 dealt with a notice of claim to property. The facts were complicated but, leaving out matters irrelevant to our purpose, the position was that the first defendant claimed to be the owner of certain land and sent notice of his claim to the plaintiffs who were in receipt of the rent of the property and who claimed to be themselves owners of it. The plaintiffs' tenant, under an agreement with the plaintiffs, continued to expend money on the land. The plaintiffs then alleged that the first defendant's notice was invalid and had been waived by his acquiescence in the conduct of the plaintiffs and the tenants. The true position was that the plaintiffs and first defendant were tenants in common of the property. The judge held that even an exaggerated claim, one which went beyond that to which the person sending the notice was entitled, was sufficient notice and need not be repeated, concluding at p. 297, " Where a party has once given a distinct notice of his claim, the *onus* is on the other side to shew he has abandoned, or given reason to believe he has abandoned, his claim." It was held that the first defendant had not abandoned his claim.

(5) Notice to Rescind a Contract

Here there are two possibilities. The contract may confer an express power, say, on the vendor, to rescind, as where he is unwilling to satisfy some requisition of the purchaser's; or there may be a unilateral rescission. There is very little authority on withdrawal or revocation of an express power to rescind, once exercised, though there are rules concerning the survival of the power in spite of negotiations with the purchaser (George, Sale of Land, 1952, 91; Williams, Vendor and Purchaser, 4th ed., 1936, 975). Such a provision amounts to consent by the purchaser, in advance, to unilateral termination. It thus differs from cases of repudiation, where the consent of the purchaser is required for rescission. Revocation of rescission under an express power would seem to allow the power to be exercised afresh after intervening negotiations. This raises quite different issues from those which arise in the case of a repudiation. On the other hand some guidance may be obtained by a consideration of the repudiation cases so far as they overlap the cases of express rescission under a term in the contract.

The authorities on the general law of contract make it clear that a unilateral attempt to rescind a contract (where no such power is conferred by the contract) is ineffective unless and until the other party adopts it, thus terminating the contract by agreement, but

without prejudice to the rights of the other party, since repudiation is also, in such circumstances, a breach of contract. The other party has to elect whether to agree to the rescission or to insist on performance. Such election must be clear and unequivocal. If he agrees to the rescission he is himself absolved from liability under the contract. On the other hand, if he insists on performance, he remains liable for his own part. A good statement of the general rule is that of Lord Atkinson in *Martin* v. *Stout* [1925] A.C.(J.C.), at p. 364, " The repudiation of a contract by one of the parties to it does not of itself discharge the contract. It only gives to the other party the option of either treating the contract as at an end, or of waiting until the stipulated time has arrived, or the contingency upon which the performance of the contract was dependent has happened." This principle seems to apply to the sale of land (Williams, *op. cit.*, p. 993). Of the numerous commercial cases perhaps the most interesting is *Avery* v. *Bowden* (1855) 5 E. & B. 714, cited with approval by Viscount Simon L.C. in *Heyman* v. *Darwins* [1942] A.C. 356, at 361. The defendant had undertaken to load a cargo aboard the plaintiff's ship at Odessa. The ship put in at Odessa and the master asked for the cargo. The defendant's agent repeatedly told him there was no cargo. The master of the ship remained in port, asking for performance of the contract. The Crimean War then broke out, discharging the obligations of the contractors. It was held that the action of the master, in refusing to treat the contract as at an end, had kept the contract alive until it was lawfully frustrated, and that the defendant was not liable. The plaintiff could not rely, as he otherwise might have done, on breach by repudiation before the outbreak of war.

Applying this general rule to the vendor's right to rescind a contract of sale of land, it would seem that no rescission takes place unless, at some moment of time, both parties agree to such rescission. Assume that a vendor purports to rescind a contract of sale under an express power. The rescission is not justified, but the purchaser agrees to it. Here the contract would seem to be at an end. Assume that the purchaser disputes the vendor's right to rescind and that the vendor admits the purchaser is right. The purchaser cannot now treat the contract as terminated, since the parties have never been at one in treating it as terminated. The purchaser has not unequivocally elected to accept the rescission and it would seem to be too late to do so, now that the purported rescission has been withdrawn. On the other hand, assume that the rescission is justified by the terms of the express power to rescind conferred on the vendor by the contract of sale. If the purchaser

accepts this, the vendor cannot now enforce the contract. If the purchaser disputes the rescission and the vendor withdraws, the purchaser would seem to have no right to insist on rescission later. The power is conferred on the vendor, not the purchaser, and any other interpretation would put the vendor in a worse position than if he had not reserved this power in the contract, and in a worse position than if his rescission were wrongful, on a true interpretation of the contractual power of rescission. It must be exceedingly difficult in any given case to know whether or not a vendor is legally justified in rescinding and there may well be a genuine dispute. If a vendor exercises the power improperly he should still have the right to exercise it properly. Refusal by the purchaser to admit an exercise as valid should leave the vendor free to decide his next move.

(6) Notice of a Claim that a Contract has been Broken

The clearest case is the leading case of *Lamare* v. *Dixon* (1873) L.R. 6 H.L. 414. A tenant protested to his landlord against the latter's failure to put the property in repair according to his parol promise. The landlord sued for specific performance of the agreement to lease. It was held that the tenant had a good defence. Lord Cairns pointed out, at p. 431, "I take the meaning of paying rent under protest to be, that the person paying indicated that he paid the rent for the use and occupation of the premises, but not as under the agreement, nor as recognizing the validity or the binding character of the agreement."

(7) Notice Making Time of the Essence

Foa (7th ed., p. 373) cites *Hudson* v. *Bartram* (1818) 3 Madd. 440 as authority for the proposition that a notice making time of the essence of a contract to grant a lease will be waived if the person serving the notice afterwards recognises the tenancy as subsisting. In the actual case there had been a demand for possession after the expiry of the time, but rent had later been demanded.

(8) Notice of Invalidity of Contract

The cases are not generally concerned with matters of land law, but the principle appears clear that the person complaining that he was induced to enter into a contract by fraud or misrepresentation has an option to affirm or avoid the contract and will only be committed by an unambiguous election to adhere to the contract, with full knowledge of the facts (Halsbury, vol. xxiii, p. 110).

(9) Withdrawal of Waiver

A person waiving performance of a continuing obligation is not bound to waive it permanently unless he receives a fresh consideration : *Bessler, Waechter, Glover & Co.* v. *S. Derwent Coal Co.* [1938] 1 K.B. 408. But arrears of rent will be irrecoverable for the period of waiver, under the principle of the *High Trees* line of cases. If the party wishes to withdraw his waiver for the future he must give reasonable notice of withdrawal to the other party (*Tungsten Electric Co.* v. *Tool Metal Mfg. Co.* (1950) 69 R.P.C. 108, discussed by R. E. Megarry, 68 L.Q.R. 304).

POWERS OF TRUSTEES FOR SALE

By Desmond Pollock, ll.b., of the Inner Temple,
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In *Re Wakeman* [1945] Ch. 177, a testator conveyed his residuary estate, which included a freehold house, to trustees on trust for sale. The trustees sold the house, and the sale moneys were invested in securities. Subsequently, the trustees wanted to realise the securities and reinvest the moneys in the purchase of other land, and took out a summons to determine whether they had power to do so under section 28 of the Law of Property Act, 1925. Uthwatt J. (later Lord Uthwatt) in a short reserved judgment held that, on the true construction of section 28, they had no such power. The powers conferred by section 28 are given to "trustees for sale," who are defined, by section 205 (i) (xxix), unless the context otherwise requires, as "persons . . . holding land on trust for sale." The conclusion of the learned judge was that trustees who had sold all land comprised in the testator's estate could not be said to be persons *holding* land on trust for sale, nor was there any context in the section itself sufficient to displace the statutory definition.

Some doubt has been felt about the correctness of this decision, and in particular it has been observed that dicta of Lord Greene M.R. in the later case of *Re Wellsted* [1949] Ch. 296 are extremely difficult to reconcile with it. Whether this is in fact so is in the writer's view open to question, though the decision itself in *Re Wellsted* tends to support the view that the construction put upon the words "trustees for sale" in *Re Wakeman* is not the correct one.

In *Re Wellsted*, it may be observed, the situation was vitally different from that in *Re Wakeman*, because the trustees for sale of the testator's residuary estate still held land which had belonged to the testator at his death and remained unsold. The question asked in the summons was whether they had power under section 28 to invest and reinvest (a) proceeds of sale of land which they had sold, and (b) investments representing similar proceeds of sale, in the purchase of land. The Court of Appeal held, reversing Vaisey J., that they had. Pausing there, it is obvious that the

decision has no direct bearing on *Re Wakeman*, because that case was not relevant to a situation where not all the land had been disposed of. Nor is it easy to see how any dicta, however wide, unless directed expressly or impliedly to the *Re Wakeman* situation, could affect the matter. The effect of the decision indirectly, however, may be to throw doubt on the earlier case.

In his careful and somewhat lengthy judgment the late Lord Greene subjected the wording of section 28 to close examination, and in the result placed upon it the widest possible construction in the circumstances. Rejecting arguments of counsel in favour of a narrow construction he held, in short, that the powers given by the opening words (*a*) of section 28 (1) included the powers of application, and the choice of application, which are conferred on a tenant for life under a settlement by section 73 of the Settled Land Act, 1925; that the word "all" meant "all," there being no context to cut it down so as to exclude certain of those powers; or to limit the powers to the powers of a tenant for life set out in Part II of the Settled Land Act; or to limit the application of section 73 to powers which can properly be described as administrative powers. Trustees for sale have, therefore, under section 28, power to invest in land.

Having dealt with the general question regarding the power to invest in land at large, Lord Greene considered the meaning of the words "proceeds of sale" in section 28, over which the power is exercisable, namely, whether proceeds of sale were limited to cash, or included investments bought with proceeds of sale. He said (at p. 313): ". . . . Those investments, historically, are derived from earlier sales of land, and it might be said that where trustees for sale have sold the land in pursuance of the directions of the settlement and have invested the proceeds, the whole of the trust for sale has been carried out, and therefore the powers given by section 28, which are . . . temporary powers pending sale, cannot be applied. I do not think that section 28 is to be limited in that way. Verbally there is, indeed, something to be said for that view, for the reason that the powers conferred are powers in relation to the proceeds of sale; and it is said that once the proceeds of sale have been received and have been invested in . . . War Loan, they cease to be 'proceeds of sale' for the purpose of section 28, and are then properly to be described, not as proceeds of sale, but as investments made out of the proceeds of sale. . . ." This argument, however, the learned Master of the Rolls did not

(*a*) "Trustees for sale shall, in relation to land or to manorial incidents and to the proceeds of sale, have all the powers of a tenant for life. . . ."

accept. He held that so long as the proceeds can be traced—and this is a question of fact in each case—they remain " proceeds of sale " within the subsection, and are properly the subject-matter of the powers in question.

Lord Greene's judgment encompassed two main questions: first, the *extent* of the powers conferred on trustees for sale by section 28 of the Law of Property Act, and secondly, the subject-matter over which such powers are exercisable. It did not deal, or purport to deal, with the allied but different question of when or under what conditions such powers can be exercised, which depends on the meaning of " trustees for sale."

Anything which the learned judge said must be construed with this in mind, and in view of the fact that the *Re Wakeman* situation was not before him, coupled with the fact that no reference was made in his judgment to *Re Wakeman* directly or indirectly, it seems difficult to interpret his words as undermining the earlier case.

Of the other members of the court, Somervell L.J. made no reference to *Re Wakeman*, and did not express any view inconsistent with it. Cohen L.J. (as he then was), however, whilst observing that the question did not arise in the case before him, referred to *Re Wakeman* and expressly reserved the question of what the position would be if no land were held on the trusts of the settlement.

It is submitted, therefore, that the judgments of the Master of the Rolls and the other learned Lords Justices are not directly in conflict with *Re Wakeman*.

At the same time *Re Wakeman* cannot be regarded as a satisfactory decision. Section 28, as Lord Greene remarked in *Re Wellsted*, " notoriously has given rise to considerable doubts and difficulties," and it is to be regretted that Uthwatt J.'s judgment on such an important question of construction was so short. As a matter of construction, no doubt, it may be difficult to find a context in section 28 which will exclude the statutory definition. The words " proceeds of sale " are not inconsistent with trustees for sale being defined as " persons holding land on trust for sale," for it is obvious that trustees may hold both land and proceeds of sale of land which they have sold. Furthermore, the only persons spoken of in the section are " trustees for sale," and it is not easy to see how persons who have sold everything can (quite apart from the definition) be trustees *for sale*.

On the other hand, in *Re Wellsted* we now have the authority of the Court of Appeal for the proposition that trustees for sale have, under section 28, all the powers of a tenant for life under a

settlement, including the power to purchase land with the proceeds of sale of land which they have sold. The importance of this decision, so far as *Re Wakeman* is concerned, is that it disposes of the argument that to give trustees for sale power to buy land is inherently repugnant to the conception of a trust for sale—an argument which might be advanced in support of *Re Wakeman*. Furthermore, if the decision is applied to the statutory definition of trustees for sale, the words " persons . . . holding land on trust for sale " must be construed to mean either (a) persons holding land, other than that which has been sold, or (b) persons holding *or having held* land, on trust for sale. If the former construction be correct, the question arises whether *any* other land held on trust for sale anywhere is sufficient, or whether it must be held under the same settlement; also, whether the other land held on trust for sale must be held on the same trusts as that which is sold.

Ordinarily, the fact that I may be the owner of Blackacre is irrelevant to my powers of disposition over Whiteacre which I also own. Similarly, the fact that I am a trustee for sale of land in Yorkshire under the ABC settlement should surely be irrelevant to the question whether I can buy land with the proceeds of sale of land in Cornwall which I hold on trust for sale under the XYZ settlement. Again, if construction (a) be right, the retention by the trustees of a plot of land, however small, would seem to keep the power to invest in land alive, whereas, as occurred in *Re Wakeman*, if all land has been sold the power has gone. Where the residuary estate is small and contains only one house which has to be sold, for example, to meet debts, the difficulty becomes patent.

Indeed, it is fair to say that construction (a) leads to difficulties and illogicalities which it can hardly have been the intention of Parliament to create. To adopt construction (b), however, which gives to the words " trustees for sale " an extended meaning (*i.e.*, persons holding or having held land on trust for sale; or persons to whom land has been conveyed on trust for sale) would avoid most, if not all, of these difficulties, particularly in regard to small estates. On the whole, since *Re Wellsted*, there does appear to be some ground for supposing that, should the opportunity occur, the Court of Appeal might not be prepared to uphold the validity of *Re Wakeman*. Nevertheless, for the moment it is the law, however inconvenient, and must be accepted as such.

THE NEW STREETS ACT, 1951

By Harold Parrish, Barrister-at-Law

Object of the Act. The object of the Act is primarily to protect the purchasers of houses on land fronting streets which are not repairable by the inhabitants at large and who will be liable to pay the expense of street works before the road is adopted under the Private Street Works Act, 1892, or the Public Health Act, 1875, ss. 150–152, or under a local Act. Frequently, purchasers of such houses were induced to buy the houses at prices which included the prospective cost of the street works and obtained in return the benefit of a covenant by the building vendor to pay the cost of the works when they were executed. Too often, when the streets were made up and the expenses under the Acts referred to became payable by the frontagers, the building vendor had died or become bankrupt, or had left the country or disappeared, or the building company had been wound up, and the frontager, who had already paid in the purchase price for the expense of making-up the street, had to pay again and was without any remedy, or any effective remedy, against his vendor.

It was originally intended, when the Bill was introduced, that the Act would free completely the purchaser from any liability for street works expenses, but it will be seen that this object has not been achieved; the purchaser, as the owner, may still be liable to some charges, although he is protected as to the greater part of his liability. It was also hoped that the effect of the Act would be to encourage the early making-up of streets by builders of houses for sale, but the Act provides no special inducements to this end; in fact the Act provides considerable dangers for the building owner who pays the required sum (or gives security therefor) and then makes up the street and sells before the street is adopted, unless he protects himself as explained later in this article. Substantial protection, on the other hand, is given to builders of houses for sale and building owners, who might otherwise have the sums paid by them (or their security) tied up for many years, by providing power for the frontagers to require the making-up of the street and its adoption.

Areas, streets and buildings to which the Act applies. This Act only applies in boroughs and urban districts, other than metropolitan boroughs, but it may be applied to any rural district by the

Minister on the application of the county council and after consultation with the rural district council; when it is applied to a rural district, the county council is the local authority to operate the Act and the rural district council is the local authority with respect to the deposit of plans : see section 9.

The Act applies to any private street as defined by section 10; this means any street within the description in the Public Health Act, 1936, (including any highway, a highway over a bridge and any road, lane, footway, square, court, alley or passage, whether a thoroughfare or not) in which the local authority have power to require works to be executed or to execute works for making-up the street under " the appropriate private street works code." The appropriate code is the Private Street Works Act, 1892 (if in force in the district), and any local Act amending that Act; or the Public Health Act, 1875, ss. 150–152, as amended by the Public Health Acts Amendment Act, 1890, s. 41, (if that code is in force) and any local Act amending those Acts; or any local Act in force; and, where there is a local Act code as well as the code in the Act of 1892 or in the Act of 1875 in force in a county borough or county district, the council of the borough or district must by resolution determine which one of the codes is to be the appropriate code in relation to each private street. " Private street " also includes any land which is deemed to be a private street by virtue of a declaration under the Town and Country Planning Act, 1947, s. 48.

A street in which the local authority may require works to be executed under the Act of 1892 and the Act of 1875 is any street, not being a highway repairable by the inhabitants at large, but otherwise including any highway and any public bridge, not being a county bridge, and any road, lane, footway, square, court, alley or passage, whether a thoroughfare or not : see section 5 of the Act of 1892 and section 4 of the Act of 1875; and the codes in those Acts have been held to apply to streets which are in all respects private and over which the public have no right : see *Taylor* v. *Oldham Corporation* (1876) 4 Ch.D. 395.

The Act of 1951 will, therefore, apply to the whole length of any such street where no part is repairable by the inhabitants at large. Where a length of such street is so repairable, the Act will apply to the remainder which is not so repairable, that is the part with respect to which there is power to require works to be executed or to execute works. This application is, however, limited with respect to certain streets partly built up at the commencement of the Act. Thus where the whole street, as defined, is less than 100 yards in length and was built up to such an extent that the aggregate length

of the frontages of the buildings on both sides of the street constituted at least one-half of the aggregate length of all frontages on both sides of the street, the Act will not apply : see section 1 (3) (g); and the whole street, it appears, must mean the whole street to which the Act would otherwise apply, that is, the street throughout its whole length if no part is repairable by the inhabitants or, if part is so repairable, the street less the lengths already repairable by the inhabitants at large. Also, where the whole street, as defined, is more than 100 yards (*i.e.*, the unadopted street or the unadopted part of the street is more than 100 yards), then if a part of that street, or of the unadopted part, which is not less than 100 yards in length and comprises the whole of the frontage on which the building will be, was at the commencement of the Act built up to such an extent that the aggregate length of the frontages of the buildings on both sides of the part constituted at least one-half of the aggregate length of all frontages on both sides of the part, the Act will not apply to that part : see section 1 (3) (g). There appears to be no objection to fixing the beginning and end of the part at any points in the street so as to give the maximum exemption, and this may be done on different occasions in respect of different buildings so as to provide exemption in respect of two or more parts of a street for which exemption could not be sustained if taken as a whole. The erection of the new buildings will then extend the area of exemption.

There is also an exemption of a street or part of a street where there is an agreement made by any person with the local authority under section 146 of the Public Health Act, 1875, providing for the carrying out at the expense of that person of street works in the street or part thereof, and for securing that the street or part, on completion of the works, will become a highway repairable by the inhabitants at large; see section 1 (3) (d). Where, however, only part of the street is to be so made up, a proposed building which is not wholly within that part will be within the Act. Such an agreement may be made at any time.

Specific buildings are also exempt from the Act or may be exempted. Thus the Act does not apply where the building proposed to be erected will be situated within the curtilage of, and be appurtenant to, an existing building or to a building where the plans have been deposited with the local authority in accordance with building by-laws before the commencement of the Act. Such plans need not have been passed before the Act to provide the exemption, but if they are rejected then new plans not providing exemption must be deposited. If the plans were passed before the Act, then a redeposit of the same plans would appear to render the

original deposit ineffective to provide exemption, and exemption would also be lost if stale plans are made ineffective by the local authority under section 66 of the Public Health Act, 1936. Other exempted buildings are buildings proposed to be erected by a local authority or by the British Transport Commission or any executive thereof, or by a development corporation under the New Towns Act, 1946, or by a trading or industrial estate company within section 15 of the Distribution of Industry Act, 1945, where the cost is to be defrayed wholly or mainly by a Government Department : see section 1 (3) (b), (c), (i) and (j).

Buildings may be exempted by the local authority by notice in writing where they are satisfied that the street or the part comprising the whole of the frontage of the proposed building is not, and is not likely within a reasonable time to become, sufficiently built up to justify the use of powers under the appropriate code, or that the street is not, and is not likely within a reasonable time to become, joined to a highway repairable by the inhabitants at large : see section 1 (3) (e) and (f). A building may also be exempted by the local authority by notice in writing where they are satisfied that the whole of the street was, at the commencement of the Act, substantially built up : see section 1 (3) (h); but such exemption will not, of course, be required where the street, or the part of the street comprising the whole of the frontage of the proposed building, is built up sufficiently to exempt the whole street or part as already referred to in considering the exemption of streets from the Act.

There is also the obvious exemption of buildings *extra commercium* which when erected will be exempt from liability to pay expenses of street works under the appropriate private street works code : see section 1 (3) (a).

Sum for works to be paid or secured. The substance of the Act is in section 1 which provides that, subject to certain exemptions set out above, where it is proposed to erect any building for which plans are required to be deposited with the local authority in accordance with building by-laws, and the building will have a frontage on a private street, no work shall be done in or for the purpose of erecting the building unless the owner of the land on which it is to be erected or a previous owner has paid to the local authority, or secured to their satisfaction the payment to them, of such sum as may be required under the following provisions in respect of the cost of street works in that street; and penalties are imposed for building in breach of the prohibition.

Where the Act applies to any street and to a proposed building in the street the local authority must, within one month after the

plans of the building have been passed, serve a notice on the person by whom or on whose behalf the plans were deposited requiring the payment or the securing of a sum specified in the notice : see section 2 (1). That sum must be such as, in the opinion of the local authority, would be recoverable under the appropriate private street works code in respect of the frontage of the proposed building on the private street if the authority were then to carry out the street works in the street; such a notice is not required to be registered as a local land charge. The street works on which the sum is to be based are such street works as the local authority would require under the appropriate code before declaring the street to be a highway repairable by the inhabitants at large : see section 2 (2). The relevant street works may vary in different circumstances because the local authority may, under section 19 of the Act of 1892, declare a street to be repairable by the inhabitants at large whenever all or any of the works under that Act have been executed and, where the Public Health Act code is the appropriate code, section 41 of the Public Health Acts Amendment Act, 1890, gives the local authority a similar discretion. The sum, it should be noted, is such sum as in the opinion of the local authority would be recoverable, and the authority is not required to undertake elaborate calculations and estimates as under the appropriate code; and they may treat a part of the street comprising the whole of the part on which the frontage will be as constituting a separate street for the purpose of arriving at the sum. The sum must also be arrived at as if the authority were " then " executing the works, so that the case of each building must be considered in the light of existing costs, which may have increased since the previous building was considered, but otherwise the opinion of the authority may be based on their opinion previously formed or on expenses just incurred in relation to another comparable street.

After arriving at the sum the authority may substitute a smaller sum by a further notice given within the month after passing the plans. There is a right of appeal to the Minister against the sum specified within one month of a notice, or, if a further notice is given, within one month of that notice, and the Minister may then substitute a smaller sum : see section 2 (3) and (4).

The payment or securing of the sum is not a complete discharge of the owner or the subsequent owner in respect of street works, and their liability under the appropriate code is deemed to be discharged only to the extent of the sum paid or secured : see section 3 (1). If the expense of the works is greater than that sum, the balance will fall on the person who is the owner liable under the appropriate code for the street works executed; it will not fall on the local

authority unless they choose to contribute under section 10 of the Act of 1892 or, where the Public Health Act code applies, under section 81 of the Public Health Act, 1925.

Repayment of the sum paid or release of the security. The time when the extent of liability is to be finally settled is when the street is declared to be a highway repairable by the inhabitants at large : see section 3 (1). This provision is in accord with the power of the local authority under the Act of 1892 and the Public Health Act code to execute or require the execution of any of the street works (other than sewering) as often as the occasion requires until the street is adopted : see *Barry and Cadoxton Local Board* v. *Parry* [1895] 2 Q.B. 110. There is, therefore, no power for the local authority to repay in part the sum paid, or release the security in part, from time to time when the owner exercises his right to make up the street himself, even if it is done to the satisfaction of the authority. If the authority wish to avoid hardship to the owner, they may exercise their power under section 19 of the Act of 1892 or section 82 of the Act of 1925 and adopt that part of the street made up by the owner; or, if the owner or owners have made up a length of the street of 100 yards or more, they may compel adoption of the street under section 6 of the Act of 1951, which is more fully considered later.

When the street or part thereof is adopted and the sum paid or secured is found to exceed the total liability of the frontage in respect of which it was paid or secured, or there is no liability because the street was not made up at the expense of the local authority, that authority must, if the sum was paid, refund the amount of the excess (or, as the case may be, the whole sum) to the person who is for the time being the owner of the land; if the sum was not paid but only secured, and the person whose property is security for the payment is still the owner of the land, then the local authority must release the security to the extent of the excess (or, as the case may be, the whole security), but if the person who provided the security is no longer the owner of the land, the local authority must pay to the owner of the land an amount equal to the excess (or, as the case may be, the whole sum) and the authority is then entitled to realise the security for the purpose of recovering the amount so paid : see section 3 (1) (a)–(c). Where, therefore, a building owner has paid the sum or given security for the cost of street works in respect of land in the street, and he then executes the street works and sells the land before the street is adopted, he will find after the sale of the land that, in addition to having himself expended money on the street works, he will on adoption of the street see the sum paid or secured by him to the

local authority paid to the purchaser and, if he gave security, the security realised against him. Thus the purchaser will have obtained the land without any expense for street works unless the vendor, on the sale, includes in the price of the land the amount of the sum deposited or secured and the cost of the street works or protects himself otherwise.

The position is very similar where the owner who has paid the sum or given the security divides the land in respect of which the sum is paid or secured into two or more parts, so that two or more owners incur or would incur the liability for street works. In that case the sum is to be treated as apportioned between those owners according to their respective frontages. If, in the case of a sum paid, there is to be a refund of the excess (or of the whole sum where the street was not made up by the local authority), it must be made in those proportions. If the sum was secured and the security is the property of one only of those owners, *e.g.*, the building owner who has sold off some of the frontages, the local authority is only required, where the security exceeds the expenses, to release the security to the extent that the amount of the sum secured apportioned against the land of that owner exceeds his liability; the local authority is entitled to realise the security for the purpose of paying to the other owners the difference between the amount apportioned to them and the actual expenses chargeable against them. Similarly, if the sum was secured and the road has been made up at no expense to the local authority, then the local authority is only required to release the security to the extent of the sum apportioned to the land retained by the owner who has given the security, and they may realise the security for the purpose of paying to the other owners the sums apportioned in respect of their premises : see section 3 (1), proviso. The owner who pays the sum or gives security and who makes up the road and then, before the road is adopted, sells part of the land in respect of which the sum was paid or security given, must therefore protect himself in the same way as he should if he sold the whole.

Effect where deposited plans ineffective or not proceeded with. It may happen that, after the sum to be paid or secured has been determined, the local authority may declare under section 66 of the Public Health Act, 1936, that the deposit of the plans shall be of no effect, or the owner of the land may give notice to the local authority of his intention not to proceed with the building. In either such case the determination of the sum and any payment or security becomes of no effect for the purpose of the Act, provided that street works have not been carried out or commenced and provided also, in the case of the owner giving notice of intention not to proceed,

that he has given such notice before any work has been done in or for the purpose of erecting the building : see section 4 (1).

Where, however, the determination as stated above has become of no effect but the sum has been paid, the local authority must refund the sum paid, with interest at 3 per cent. from the time of payment, to the person who is for the time being the owner of the land; if the sum was secured, then where the person whose property is security for the payment is still the owner of the land, the local authority must release the security, and where he is no longer the owner of the land they must pay to the owner of the land the amount of the sum secured, and are then entitled to realise the security for the purpose of recovering the amount so paid : see section 4 (2). An owner who has made up the road after the payment of the sum or giving the security, and who then sells the land before adoption of the road, must therefore protect himself, or his purchaser will have received the benefit of the making-up without expense.

A similar position arises where the owner who has paid the sum or given the security divides the land into two or more parts so that two or more owners would, if the street works were carried out, incur liability for them. In such a case the sum, together with the interest, is to be treated as apportioned between the owners according to their respective frontages and the sum paid must be repaid by the authority to the owners in those proportions; and if the sum was secured and the security is the property of one only of those owners, *e.g.*, the building owner who has sold off some of the frontages, the authority is only required to release the security to the extent of the amount apportioned to that owner and, after paying the other owners the amounts apportioned in respect of their premises, may realise the security for the purpose of recovering the amounts so paid : see section 4 (2). An owner who has made up the road after paying the sum or giving the security, and who then sells part of the land in the street before the street is adopted, must, therefore, protect himself on the sale of the part in the same way as he would on the sale of the whole of the land.

Provision is also made by section 4 (3) of the Act for the procedure where an owner, having given notice of his intention not to proceed with the building, changes his mind and gives notice of intention to proceed with the building in accordance with the plans as originally deposited. The local authority then have one month from the notice of intention to proceed within which to serve a notice under section 2 requiring payment of the sum or the giving of a security.

Power to compel adoption of a street. Where there is at least one case in which a payment has been made or security has been given under the Act in respect of street works in a private street by the owner of land having a frontage on the street, and the street is built up, a majority of the owners of land having a frontage on the street, or as many of those owners as have between them more than half the aggregate length of all the frontages on both sides of the street, may require the making-up and adoption of the street : see section 6 (1). A street is deemed to be built up for this purpose if the aggregate length of the frontages of the buildings on both sides of that street is at least one-half of the aggregate length of all frontages on both sides of the street; and any part of a street, if not less than 100 yards in length, may be treated by the owners of the frontages on that part as constituting a street for the above purposes : see section 6 (3).

This provision, subject to the qualifications which follow, ensures that the street will be made up within a reasonable time after payment of the sum or the giving of the security, and combines with it the requirement of the adoption of the street, which is the condition for the repayment of any excess sum or release of the security. Under section 20 of the Act of 1892 and section 82 of the Public Health Act, 1925, there is no power to require the making up of a street but only a power to require adoption after a street is made up, and even so there is no power to compel adoption of part of a street.

It will be seen that in the case of part of a street of not less than 100 yards in length, which is not built up to half the length of the total frontage at the commencement of the Act so as to exclude the street from the Act under section 1 (3) (g), if a new building would bring the built-up length to half, the frontagers will be able to exercise their powers to compel the execution of works and the adoption of that part of the street, unless the local authority are in a position to exercise their powers, and do so exercise their powers, under section 1 (3) (h), to exempt the new building on the ground that the whole street was substantially built up at the commencement of the Act.

Under section 6 of the Act of 1951 the request by the frontagers is to be made " to the local authority by notice in writing to exercise their powers under the appropriate private street works code so as (a) to secure the carrying out of such street works in that street as the local authority require under that code before declaring the street to be a highway repairable by the inhabitants at large, and (b) to declare the street to be such a highway " and

the local authority must proceed to exercise their powers accordingly.

A question may arise as to the application of the section where the street has already been made up without the intervention of the local authority. It would appear that the section would apply, provided the street works so carried out are such as the authority would require under the appropriate code, the duty to secure the carrying out of such street works being fulfilled in advance and adoption must then follow as of course. A builder who has made up at least 100 yards of the street and built up one-half of that length can therefore compel the adoption of the street and the release of his money or security, but, if he sells before the adoption, he may require the co-operation of his purchasers. A local authority who wish to assist such a builder can do so, of course, by using their powers of adoption of part of a street under section 19 of the Act of 1892 or section 41 of the Public Health Acts Amendment Act, 1890, where in force.

The powers of compelling the execution of works may, however, be restricted by government policy because a local authority are not under section 6 of the Act of 1951 to be taken as being required or empowered to carry out street works for which an authorisation is required under the Defence (General) Regulations, 1939, reg. 56A, unless they obtain such an authorisation. Extravagant expenditure by any government, necessitating the restriction of such authorisations, coupled with the inflation of costs following on such expenditure, might well postpone the making-up to such a time that much of the protection of the frontagers would be destroyed by the excess sums required of them under section 2 on the making-up of the street and its adoption.

Security not deemed a prior mortgage. A security on land given under section 1 of the Act for the street works would, but for section 5 of the Act, restrict the powers of a building society to lend money to be secured on that land by reason of section 13 of the Building Societies Act, 1894, which prohibits advances by building societies on second mortgage. Section 5, however, provides that a mortgage or charge given to secure the street works is to be deemed not to be a prior mortgage within the meaning of section 13 of the Act of 1894. This does not, of course, affect the actual priority of the security given for the street works, but merely enables a building society to lend where it would otherwise be restricted.

NOTES OF RECENT CASES

1. *LAW OF PROPERTY AND CONVEYANCING*

By S. M. Tolson, Barrister-at-Law

Michael Borys v. *Canadian Pacific Ry. and Another* [1953] 2 W.L.R. 224; [1953] 1 All E.R. 451

Sale of land—reservation of "petroleum"—right to work petroleum implied.—This was an appeal to the Judicial Committee from the Supreme Court of Alberta, and although the case on its facts will not be of importance in this country, the observations of the Board on the law of reservations, express and implied, are of some interest.

The appellant was the owner of certain property which had been conveyed to his predecessor in title in 1906 by the first respondents, who had reserved to themselves in the conveyance "all coal, petroleum and valuable stone." In 1949, the first respondents leased the reserved petroleum on the land to the second respondents, together with an exclusive right to work it and carry it away. There was no such right in the conveyance of 1906. Under the appellant's land there was a large impervious container of porous rock, which held in the bottom water, then a layer of petroleum and on top a layer of gas. Though these substances were fugacious and could move about in the container, they could not escape out of it, and were subjected to a high pressure and high temperature, so that if any of the substances were drawn out the vacant space would be filled. Due to the high pressure, some of the gas was held in solution in the petroleum, but would, of course, become gas again when brought to the surface in the petroleum.

The appellant asked for a declaration that all the gas in a free state or in solution belonged to him, and for an injunction restraining the respondents from working the petroleum in such a way as to interfere with or waste the gas.

It was held, first, that there was evidence to justify the concurrent findings of fact by the Canadian courts that petroleum and gas were separate substances, though they were a combination of the same elements, and therefore the gas existing as such in the container belonged to the appellant.

Secondly, as regards the gas in solution in the petroleum, their Lordships held that the meaning of the word "petroleum" as a matter of construction was to be found from the vernacular, and that the parties to the conveyance of 1906 would have included in "petroleum" all the liquid substance which was comprised in the petroleum in the container. Therefore the petroleum and all that it contained in the ground belonged to the respondents.

Thirdly, though there was no right to *work* the petroleum in the conveyance of 1906, that did not abrogate or limit the respondents' powers, for as long as no subsidence is caused thereby, the reservation of a substance necessarily implies the power to recover it. (See *Rowbotham* v. *Wilson* (1860) 8 H.L.C. 348; and *per* Lord Hatherley in *Ramsay* v. *Blair* (1876) 1 App.Cas. at p. 704.) Lord Porter said: "A reservation by a landowner of the mines and minerals . . . is meaningless unless it is accompanied by the right to work and to recover the substance reserved." It was emphasised by the Board that the right of support did not arise at all in this case as there was no question of subsidence, it was simply a question of the respondents' right to take from an authorised boring "fugacious material which makes its way to the surface as a result of natural effluxion." As the respondents had a direct grant of the petroleum and the appellant only residual rights, the respondents were under no obligation to conserve the free gas or prevent it from escaping.

Hinckley and Country Building Society v. *Henny* [1953] 1 W.L.R. 352

Mortgagee's claim for possession—notice required by attornment clause.—In this case, default having been made by the mortgagor, the sole question was whether the building society, the mortgagees, were entitled to re-enter the mortgaged property without giving the seven days' notice required by the attornment clause in the mortgage.

Upjohn J. said that it was perfectly clear that an attornment clause in a mortgage was valid, and that its terms were binding. It was introduced in order to give increased protection to both mortgagor and mortgagee (he referred to the words of Lord Chelmsford in *Jolly* v. *Arbuthnot* (1859) 4 De G. & J. at pp. 235–6, and to Bramwell L.J. in *Re Stockton Iron Furnace Co.* (1879) 10 Ch.D. 335 at p. 357).

Woolwich Equitable Building Society v. *Preston* [1938] Ch. 129, which is given as the authority for a conflicting statement contained in the Annual Practice (1952 ed.), p. 1128 (under the heading "Possession"), was a case in which the attornment clause provided that once the power of sale had arisen, no notice to quit should be necessary. In the instant case there was no such provision, and therefore, the building society must give seven clear days' notice in writing to the mortgagor to determine the tenancy, before they could claim possession of the property.

John Ojobo Agbeyegbe v. *Festus Makene Ikomi* [1953] 1 W.L.R. 263

Setting aside sale of land—bona fide purchaser—laches.—This was an appeal to the Judicial Committee from the West African Court of Appeal. The facts are somewhat complicated, but it will be sufficient to say that the respondent had originally bought the land under dispute at a public auction in 1938. The sale was contested by the appellant, a judgment creditor, who, however, did nothing further about the matter until 1947, when he applied successfully to have the

case relisted. It was then found that the sale was null and void, but on appeal to the West African Court of Appeal it was held that the trial judge had not taken all the relevant circumstances into consideration, including the appellant's delay, and the effect of setting aside the sale upon the respondent, a bona fide purchaser. The respondent had in the intervening years pulled down and rebuilt the buildings on the land.

The Judicial Committee affirmed the judgment of the Court of Appeal without hesitation, and held that the case ought never to have been relisted. Lord Oaksey, who delivered the judgment of their Lordships, adopted the words of Lord Blackburn on laches in *Erlanger* v. *New Sombrero Phosphate Co.* (1878) 3 App.Cas. 1218 at p. 1279, and found that there was clearly a " balance of justice " in favour of the respondent in view of the delay, the inadequacy of the reasons for the delay, and in view of the acts done by the respondent in the interval.

Muir v. *James* [1953] 2 W.L.R. 423; [1953] 1 All E.R. 494

Building licence—additional gardening work—Defence Regulations, 1939, *No.* 56 (*a*).—In this case, the plaintiff, a builder, having built two garages on premises owned by X, under a licence issued to her, performed certain other work including building a driveway to the garages, on the instructions of the defendant, X's father, who occupied the premises with X. In an action for the cost of the additional work, the defendant contended (inter alia) that as there was no licence in respect of it, the work had been illegally done in contravention of Regulation 56 (*a*) of the Defence Regulations, 1939.

The Court of Appeal held that even if the additional work was within the general controlling words of the regulation (which they doubted), the free allowance under the Control of Buildings Operations (No. 16) Order, 1951, was available to cover it under the principles laid down in *J. Dennis & Co., Ltd.* v. *Munn* [1949] 2 K.B. 327, as the additional work was ordered separately.

Though they left the matter open, Somervell and Romer L.JJ. thought that notwithstanding the words of Denning L.J. in *J. Dennis & Co., Ltd.* v. *Munn* (*supra*) at p. 332, work might fall outside the regulations if it were ordered separately and outside the licence specification although it were executed at the same time as the licensed work.

Yorkshire Dyeing and Proofing Co., Ltd. v. *Middleton Borough Council* [1953] 1 W.L.R. 393; [1953] 1 All E.R. 540

Drainage—additional trade premises—no alteration in character, volume or rate of discharge—Public Health (Drainage of Trade Premises) Act, 1937.—If a manufacturer, exempted from the provisions of the Public Health Act, 1937, by section 4 of that Act, acquires after 1937 new premises adjoining his business, and commences to discharge trade effluent from the new premises, through the old premises and into the local authorities' sewer, he commits an

offence under section 2 of the Act, if he does not give the local authority notice or obtain their consent. This is so even though neither the character, volume or rate of discharge into the sewer is altered.

The Queen's Bench Division held that, according to the wording of the Act, the " trade effluent " as defined by section 14 was produced on different premises to those used before, and that the Act applied to both direct and indirect discharge. The manufacturer was therefore held liable in respect of the discharge from the new premises.

Perry v. *Garner* [1953] 2 W.L.R. 271; [1953] 1 All E.R. 285

Destruction of rats by occupier—Prevention of Damage by Pests Act, 1949.—In this case stated by the Buckinghamshire justices, the Queen's Bench Division held invalid a notice served by the local authority on the defendant under section 4 of the Prevention of Damage by Pests Act, 1949, requiring him within 14 days to destroy the rats on his land by " poison treatment of the infested land . . . or other work of a not less effectual character. . . ." Section 4 of the Act requires that the notice shall specify the steps to be taken for the destruction of the pests, and the court held that though in the present case the notice might have been good had the poison treatment alone been specified, it was rendered unspecific and bad because the " other work " was left completely at large.

Heatley v. *Steel Company of Wales, Ltd.* [1953] 1 W.L.R. 405

Leasehold house subject to mortgage—no financial benefit accruing to widow—Fatal Accidents Acts.—In this case the Court of Appeal reversing Croom-Johnson J. at first instance, held that a widow, claiming under the Fatal Accidents Acts in respect of her husband's death, should not give any credit for the mortgaged leasehold interest in the family home which had passed to her on her husband's intestacy. The interest comprised practically the whole of the deceased's estate, and the court found that the widow was in the same position as before her husband's death, and had not benefited save by some nominal amount. If she sold her interest in the house she would have to use the purchase money to pay for other accommodation for herself and her children.

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2. *TRUSTS*

Re Dick [1953] 2 W.L.R. 477; [1953] 1 All E.R. 559

Power of appointment—fraud on power.—In this case the Court of Appeal decided that the propositions laid down by Cohen L.J. in *Re Crawshay* [1948] Ch. at p. 134, on the circumstances which

constitute a fraud on a power, were not intended to be exhaustive. The general rule in these cases was stated by Lord Parker of Waddington in *Vatcher* v. *Paull* [1915] A.C. 372 at p. 378, and quoted by Cohen L.J. in *Re Crawshay* (*supra*): "A bargain is not essential. It is enough that the appointor's purpose and intention is to secure a benefit for himself or some other person not an object of the power." In the present case Evershed M.R. said: "I should not wish to be thought to lay down that whenever there is any intention, however secreted in the bosom of the appointor, to benefit some non-object in some measure, that therefore the exercise of the power is bad. . . . Although 'fraud on a power' does not carry the sense of deceit which the word 'fraud' bears in other contexts, it indicates the doing of something which is not right, using those words in their broad sense—at least, a deliberate defeating of what the donor of the power authorised and intended."

The circumstances of the instant case, the learned Master of the Rolls found of "most vexing difficulty." A testatrix had a power of appointment over a share in certain trust funds in favour of her brothers and sisters or their issue, and in default of appointment it was provided that her share should accrue to the similar shares vested in her brothers and sisters. The testatrix's will, the last of many, purported to appoint the property to the testatrix's sister, but if the sister did not survive the testatrix for more than a month, then to a nephew. By a contemporaneous memorandum, which had also many predecessors, the testatrix desired the appointee "without imposing a trust or legal obligation" to provide an annuity for a non-object of the power, which annuity would have used a large portion of the trust fund. The memorandum further requested that if the annuitant did not survive the testatrix for more than one month, then an annuity for a reduced amount should be paid to the annuitant's daughter. The testatrix spent a great deal of time and trouble obtaining advice with regard to her powers of disposing of her property, and with regard to the terms of her wills and memoranda. Just before she died the testatrix wrote to the appointee a letter to be opened after her death, in which she revised the directions in the memorandum, but in which the greater part of the appointed fund would still have been applied to the benefit of the non-objects, the annuitants.

The Court of Appeal with some hesitation upheld Wynn-Parry J. at first instance, and came to the conclusion that the right inference was that the testatrix's real deliberate purpose, which she set out by all possible means to achieve, was to benefit the non-objects via her relations. She did not merely wish to benefit her relations subject to the hope that they would do something along the lines she had suggested.

The learned Master of the Rolls emphasised that he was making no attempt at an exhaustive formulation of the principles applicable to frauds on powers, but he confessed that he was not uninfluenced by the fact that if he had held that the instant appointment was good, the consequence would be that any donee of a special power of appointment would be able to provide a substantial part of the appointed property for the benefit of non-objects.

Re Williams' Will Trusts [1953] 2 W.L.R. 418; [1953] 1 All E.R. 536

Advancement clause—business—medical profession.—In this case Danckwerts J. had to decide whether in a will a power to advance to the testator's son on attaining 35 " for the purpose of starting my said son in business or for the advancement of any business in which he may be concerned," included the power to purchase a house for the son to practise in as a doctor.

The first question was whether the word " business " in the clause included the medical profession. The learned judge held that it plainly did. He referred to the Oxford Dictionary and to *Smith* v. *Anderson* (1880) 15 Ch.D. 247, and *Manchester Corporation* v. *Buttle* [1929] 2 Ch. 390, where the meaning of the word was considered in other contexts. Then, having referred to the Medical Practitioner's Handbook on the methods of becoming a principal in general practice, the learned judge found that it was impossible to see how the starting of the son in " the business " could be advanced more certainly than by providing him with the capital to purchase a house for the purposes of his profession. He held accordingly that it was within the powers of the trustees to advance such sum for the purpose as they thought proper.

Stephens v. *Hutchinson and Another* [1953] 2 W.L.R. 545; [1953] 1 All E.R. 699

Trust for sale—tenants in common—receiver appointed—creditor not entitled to order for sale—Law of Property Act, 1925.—The first and second defendants, husband and wife, held a certain house on trust for sale for themselves as tenants in common. The wife who had very little means lived in the house, and from time to time also the husband, who was a complete spendthrift. The plaintiff, who was a judgment creditor of the husband, was appointed receiver by way of equitable execution of the husband's interest in the house, and then asked for an order for sale of the house under section 30 of the Law of Property Act, 1925.

Upjohn J., after referring to the words of Kekewich J. in *Ideal Bedding Co.* v. *Holland* [1907] 2 Ch. 157 at p. 169, said that the effect of appointing a receiver was not to create a charge on the property, but that the appointment operated as an injunction against the judgment creditor receiving the income; and, though this is doubtful, it might also give the judgment creditor the right to obtain an injunction against third parties receiving the income. The receiver, said the learned judge, had a mere personal right, and no right over the profits *in rem*; he continued, " A receiver so appointed is not . . . a person interested for the purposes of section 30; ' a person interested ' there means a person interested in some proprietary right under the trust, and does not include a person who may have some personal rights—. . . ."

The plaintiff contended secondly that he had a charge on the property under section 195 of the Law of Property Act, 1925, as the owner of an equitable interest in land. It was argued that by virtue

of section 205 (x) of that Act an interest in the proceeds of sale of land was included in an equitable interest in land. But it was pointed out by the learned judge that the definition contained in section 205 (x) was of " equitable interests " and not of " equitable interests in land," and therefore section 195 does not create a charge upon the proceeds of sale of land. He noted *Thomas* v. *Cross,* 2 Dr. & Sm. 423, a decision on the earlier provision, similar to section 195 contained in section 13 of the Judgments Act, 1838, which agreed with his conclusion, and he also found support for his decision in the Land Charges Act, 1925. By section 195 (3) (1) of the Law of Property Act, 1925, the charges created under that section have to be registered to be valid, and the corresponding provisions in the Land Charges Act, 1925, contained in sections 6 and 7, are only appropriate to the registration of writs and orders affecting land.

The learned judge said finally that even if the plaintiff had had an interest in land under section 30 of the Law of Property Act, 1925, he did not think that this would have been a proper case to order a sale, as it would have the effect of turning the innocent wife, who had suffered from the husband as much as the plaintiff, out of the matrimonial home of which she was half owner in equity. This is an interesting addition, although *obiter,* to the earlier decisions in *Re Hyde's Conveyance,* Law Journal, 1952, p. 58 (see Vol. 16, p. 132); *Re Mayo* [1943] 2 All E.R. 440, and *Re Buchanan-Wollaston* [1939] 2 All E.R. 302.

Shephard v. *Cartwright* [1953] 1 W.L.R. 460; [1953] 1 All E.R. 569

Resulting trust—presumption of advancement.—This case arose out of claims of a remarkable character made by two children of a deceased testator for alleged advancements or gifts by him to them, the making of which only came to light on a search through his papers after his death. The testator had for a long time used his children's names to help him in his own business activities, but the children themselves knew nothing about it, and they signed any documents he gave them unquestioningly. Shares in companies promoted by the testator had been allotted to the children, and then sold by him, and it was in respect of the money arising from the sale of these shares, about £148,000, that the claims arose. Subsequently, the testator had formed a new company in which the claimants were credited with about £50,000 each on loan account, and this was still the claimants' position *vis-à-vis* that company, though they offered to give credit for these sums as against their claims. It also transpired at the hearing that the testator had from time to time purchased houses in the names of the claimants and that the claimants were then told that the properties were gifts. Also, by his will the testator had bequeathed his residue to his children equally (there were three), though due to the claims the net estate was nil.

As Harman J. explained, the presumption of advancement arises when a father buys property in the name of his children, but this is rebutted by evidence of a contrary intention. It was argued that

as the allotments of shares to the children in the first company were unexplained by contemporary evidence, they must be taken to be advancements as no evidence of later events was admissible. The learned judge rejected this contention, and quoting Sir George Jessel M.R., in *Marshal* v. *Crutwell* (1875) L.R. 20 Eq. 328 at p. 329, he distinguished subsequent events from subsequent oral declarations. Harman J. said that subsequent events " so far as they throw light on what the father's state of mind was when the allotments were made, are . . . to be treated as part and parcel of the original transaction because intimately connected with it and therefore admissible."

Having considered the evidence thus held to be admissible, the learned judge came to the conclusion that the testator had not by the allotments intended to commit himself irrevocably by way of out-and-out gifts (see *Devoy* v. *Devoy* (1857) 3 Sm. & G. 403, *per* Stuart V.-C. at p. 405) nor, after the new company came into existence and the loan accounts were created, could he have intended that his children should be allowed to prefer further claims against him by raking back into his past transactions.

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3. *WILLS*

By A. Kiralfy, Barrister-at-Law

Re Bates [1953] 1 W.L.R. 276; [1953] 1 All E.R. 318

Inheritance (Family Provision) Act, 1938—*jurisdiction to allow capital payment.*—In this case, to which the new Intestates' Estates Act, 1952, did not apply, the testator's estate did not exceed £2,000. Roxburgh J., in the event, decided to order an income payment, but the principles on which the court may exercise its discretion to allow a capital payment were considered. The 1938 Act limited relief to one-half of the income where the testator left a widow but no other dependant. The learned judge held that a payment of one-half the capital would not be in accordance with this principle but that the court could award the capitalised value of the widowhood interest. This appears to give the widow a claim to the capitalised value of an " annuity " for life corresponding to the income of the estate. Otherwise the mere fact that the estate was small would give her a much greater relative benefit than in the case of a large estate. The peculiar jurisdiction over small estates appears thus to depend on administrative convenience rather than on ultimate benefits. The short limitation period (section 2) on claims for family provision will soon make decisions on this part of the 1938 Act obsolete, as the 1952 Act refers to the whole income of the estate, but the principle of *Re Bates* will presumably apply under the new Act to limit the dependant to a capitalised " life annuity " corresponding to the income. The new Act emphasises the limitation by treating an award of the whole income of the estate as a restriction on the court's powers: 1938 Act (as amended by 1952 Act), s. 1 (3). It would be interesting to see

how the capitalised sum is arrived at, where the income of the estate varies from year to year. A likely solution is a sum corresponding to the lowest average income, since the court is not bound to exercise its discretion to give the dependant the maximum possible benefit. In the instant case the estate had been left largely to charity.

(Theobald 75.)

Re Kendrew [1953] 2 W.L.R. 550; [1953] 1 All E.R. 551

Condition—literal fulfilment—employment of wife.—Real and personal property was left to the testatrix's housekeeper if she continued in the service of the testatrix's husband. The legatee-devisee remained his housekeeper for a time and then they married. Prior to the marriage she entered into an agreement under seal with the widower to work as his housekeeper. The Court of Appeal held that there was no legal impediment to a binding contract between a husband and wife and that the housekeeper had literally complied with the condition. The fact that the contract was made *eo intuitu* was irrelevant. This decision does rough justice. At some future time a situation might arise in which the new wife was unable, *e.g.*, through illness, to act as housekeeper, but the court cannot anticipate such problems, and did not in fact deal with them.

(Theobald 215.)

Re Henry's Will Trusts [1953] 1 W.L.R. 376; [1953] 1 All E.R. 531

Gift of income for life or indefinite gift of income—contingency not provided for—fate of capital.—Income was left to M. until marriage, with a direction to settle the fund on her in a certain way upon her marriage. In the event she died unmarried. Upjohn J. held that the first gift should be read, in the usual way, as a gift until death or marriage, since it could not be known until her death whether she would marry. This gave the widow a life interest in the income at most. The learned judge refused to construe the gift as a gift of indefinite income, *i.e.*, of corpus, with a gift over on her marriage which could now be ignored, making M's interest absolute. The case was clearly distinguishable from the other type of case, where income is to be paid to X, but given over if X marries Y. In this latter case X takes absolutely if she never marries, and the capital belongs to her estate as soon as she dies. The absence of any express gift over on M's death did not by itself decide that M's interest was meant to be absolute.

(Theobald 334.)

Re Allen [1953] 2 W.L.R. 244; [1953] 1 All E.R. 308

Uncertainty of condition—"Church of England" membership.—In this case land was devised to the eldest of the sons of F. "who shall be a member of the Church of England and an adherent to the doctrine of that church." It was held that the condition precedent was uncertain and the entire gift failed. Membership of the "Church of England" has previously been held incapable of ascertainment and the decision is not novel, but Vaisey J. gave a very full explanation for the treatment of these cases in this way: He pointed out that Methodists might consider themselves members of the Church of England, that there were variations in doctrine within the Anglican Church, and that many people described themselves as "Church of England" as the path of least resistance. A person who had been baptised and confirmed in the Church of England and was a communicating parishioner would certainly satisfy the test laid down by the testator, but that test did not necessarily exclude persons who could not establish their qualifications so clearly. The Reformation settlement in England and the survival of many laws based on universal duty to attend Anglican services increase the difficulties which the courts meet in such cases.

(Theobald 431.)

Re Jones [1953] 2 W.L.R. 283; [1953] 1 All E.R. 357

Uncertainty — condition not saved by deference to trustees' decision.—In this case income was left to the testator's daughter with a gift over if she should have social or other relationships with a named person. The trustees were to decide in their uncontrolled discretion whether this had happened. Danckwerts J. held that the condition subsequent was void for uncertainty and that the trustees' opinion could not cure this. They might well consult the court for directions and the court would be unable to advise them. The case of *Dundee General Hospital Board of Management* v. *Walker* [1952] 1 All E.R. 896 was distinguished, but is, in any case, a decision on Scots law.

(Theobald 432.)

Re Brooke [1953] 1 W.L.R. 439

Class gift—lapse—substituted gifts—relation back.—This case involved several aspects of construction of substitutionary gifts. A testator left property to his widow for life, followed by a gift to his brothers and sisters, with a substituted gift to nephews and nieces of the share their deceased parents would have taken, if living. The question for the court was whether deceased brothers and sisters for this purpose included any who predeceased the testator or only predeceased the widow after surviving the testator. It was held that

the proper construction of the gift was a vested gift to brothers and sisters, subject to divesting if they died during the widow's life leaving children (following the decision of the Privy Council in *Greenwood* v. *Greenwood* in [1939] 55 T.L.R. 607). Consequently a child of a brother who survived the testator but predeceased the widow, took the share which his parent had taken. The reference to the brothers' or sisters' share as one they "would take" was therefore held to refer to a case where nothing had as yet vested in such brother and sister and was construed as introducing brothers and sisters who died before the testator, not living long enough to take any share at all. On the other hand no brother or sister who died before the will could have been meant to benefit under the testator's will and therefore no child of such brother or sister could take, as there was no possibility of such brother or sister taking anything. *Miller* v. *Gerrard* [1941] A.C. 461 was considered.

(Theobald 473.)

As there were no words of severance the children of any one brother or sister took the parent's share as joint tenants.

(Theobald 298.)

Re Basioli [1953] 2 W.L.R. 251; [1953] 1 All E.R. 301

Wills Act, 1837, *s.* 33—*lapse—fiction of surviving testator—limits of fiction—recognition of true date of legatee's death.*—The draftsman of the Wills Act has created difficulties by the form of the provisions to prevent lapse. The legatee who dies before the testator is deemed, where the section applies, to have survived him. If the legatee has left his property back to the testator it has been held that the testator must logically be deemed to have predeceased the legatee, if the legatee is deemed to have survived the testator, and therefore the testator's estate takes nothing (*Re Hensler* (1881) 19 Ch.D. 612). In the instant case Upjohn J., after a careful examination of the cases, has followed the statements in previous cases and approved the exposition of the subject in Theobald (p. 560) and Jarman (Vol. 1, p. 468). *Re Hensler* is limited to the particular case where the legatee leaves his property to the original testator. For all other purposes the beneficial devolution of the legacy is governed by the position at the true date of the legatee's death. Any other solution would divide the devolution in many cases, one person taking on the legatee's intestacy under the gift in the will, and another taking the legatee's other estate. In this case the testatrix died in 1940. Her daughter-legatee died intestate in 1929 survived by a husband and son; and the husband died in 1939. The daughter's son died under 21 in 1949. The lapsed legacy was held to devolve in the same way as the daughter's other estate, so that the husband's estate was entitled to benefit.

(Theobald 560.)

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4. *PLANNING CASES*

By T. A. Blanco White, Barrister-at-Law

Swallow and Pearson v. *Middlesex County Council* [1953] 1 W.L.R. 422; [1953] 1 All E.R. 580.

Enforcement notice—defect in form—application for planning permission—estoppel.—This was yet another case concerning the proper procedure to be adopted by landowners faced with a defective enforcement notice. In the present case, they first applied for planning permission for continuing the offending use of their land, then appealed to the Minister when permission was refused, and finally (the appeal having been rejected) sued in the Queen's Bench Division for a declaration that the notice was formally defective. Held, that the notice was invalid for the usual reason (see *Burgess* v. *Jarvis* (1952) 2 P. & C.R. 377, noted 16 Conveyancer 137); and that the plaintiffs had not, by applying for planning permission and appealing against its refusal, approbated the notice or otherwise estopped themselves from denying its validity. An enforcement notice is either valid or invalid, and if it is invalid no amount of waiver or approbation can make it valid. This is certainly the reasonable conclusion. It might perhaps be better, in some cases, to apply for the permission and sue for the declaration simultaneously rather than one after the other, but it would be unreasonable if failure to do this made any substantial difference to the plaintiff's rights.

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5. *LANDLORD AND TENANT CASES*

By J. Muir Watt, M.A., of the Inner Temple, Barrister-at-Law

Boyer v. *Warbey* [1953] 1 All E.R. 269

Rent Restrictions Acts—statutory tenant vacating premises without notice—liability for rent—liability to pay a fixed sum for redecoration due at end of tenancy.—This case decided some important points about the liability of a statutory tenant, who vacated a dwelling without notice, to pay rent after he left, and to pay a fixed sum due at the end of the tenancy in respect of redecoration, under the tenancy agreement made with his predecessor in title. The facts were that the tenant was the assignee, with the landlord's consent, of the unexpired portion of a short term of years, and remained in possession after the expiry as a statutory tenant. The agreement creating the term of years, an agreement under hand only, contained an undertaking to pay £40 at the end of the term towards redecoration. The tenant vacated the dwelling without notice. The landlords did not accept surrender of the tenancy, but about two months after the tenant left relet the dwelling. The landlords claimed rent from the tenant up to the date

when they relet, and they also claimed the £40 for redecoration. The Court of Appeal held as follows:—

(1) The tenant was bound to give three months' notice of his intention to vacate the dwelling: section 15 (1) of the 1920 Act. The landlords were entitled to hold him to this, and were under no obligation to accept possession when he chose to offer it. Whether the tenant was liable for "rent" as such or for damages for breach of the statutory obligation under section 15 (1) was immaterial, since the amount of damages would be quantified by the amount of rent he would have had to pay had he remained in possession, and the landlords were under no duty to mitigate damages by reletting the flat earlier than they did.

(2) The £40 for redecoration was not a penalty, but a reasonable amount agreed in advance in lieu of damages for failure to carry out the obligation to redecorate.

(3) (Evershed M.R. dissenting.) The agreement to pay £40 "touched and concerned the thing demised," so as to run with the land and bind the tenant as the assignee, despite the fact that the agreement was under hand only, and not under seal. Denning L.J., with the support of Romer L.J., said that since the Supreme Court of Judicature Act, 1873, the doctrine of *Elliott* v. *Johnson* (1866) L.R. 2 Q.B. 120, under which the principle of covenants running with the land applied only to covenants under seal, was no longer law. "There is no valid reason nowadays why the doctrine of covenants running with the land—or with the reversion—should not apply equally to agreements under hand as to covenants under seal, and I think we should so hold, not only in the case of agreements for more than three years which need the interposition of equity to perfect them, but also in the case of agreements for three years or less which do not." It may be observed that in the present case the assignee had gone into occupation and paid the rent, so that the rule in *Buckworth* v. *Simpson* (1835) 1 C.M. & R. 834 applied, under which a new holding would be implied upon the terms of the original tenancy. Denning L.J.'s wider dicta, which Romer L.J. apparently approved, were not, therefore, strictly necessary to the decision, but they are obviously important. Evershed M.R.'s dissent under this head was based on his view that the agreement here was to pay a sum of money and was not so "inextricably bound together" with the covenant to repair as to "touch and concern" the land. The actual drafting of the agreement in the case was somewhat muddled and Evershed M.R. felt disinclined to "redraft" it.

(4) (Evershed M.R. dissenting.) The agreement to pay the £40 survived into the statutory tenancy. It was not so inconsistent with the provisions of the Rent Acts as to be excluded. Although the sum was payable "at the end of the term" it could reasonably be construed as payable "at the end of the tenancy" so as to bind the statutory tenant at the determination of his statutory tenancy. Evershed M.R. thought that

there were too great difficulties in this view to make it acceptable. The covenant to pay the £40 was tied up with an obligation to give up possession at the end of the contractual term which the Rent Acts nullified; there were difficulties in the possibility of one statutory tenant succeeding another under section 12 (1) (*g*) of the 1920 Act and being liable on the undertaking; and it was difficult to believe that it could become immediately enforceable if a court order for possession were made, say, under paragraph (*h*) of Schedule I to the 1933 Act.

(Rent Restrictions Guide, 3rd ed., p. 105; Megarry, 6th ed., p. 165; Woodfall, 24th ed., p. 552.)

Beck v. *Scholz* [1953] 1 All E.R. 814

Rent Restrictions Acts—personal occupation—"two-home men"—amenity and convenience insufficient.—In this case the Court of Appeal applied the dictum of Evershed M.R. in *Hallwood Estates, Ltd.* v. *Flack* (1950) 66 T.L.R. (Pt. 2) 368, at 369–70, that the attempts to extend the doctrine of "the 'two-home' man . . . should be regarded with some reserve." In the present case, the tenant had a flat in London and she and her husband had a home at Luton where the husband carried on business. The London flat was looked after by caretakers, and furniture belonging to the tenant remained in it, but the tenant and her husband made only occasional use of it. During the year preceding the court proceedings the tenant slept on four or five occasions at the flat, and the husband on some six occasions. The county court judge, regarding himself as bound by *Langford Property Co., Ltd.* v. *Tureman* [1949] 1 K.B. 29, as a matter of law, to hold in favour of the tenant, rejected the landlord's claim to possession. The Court of Appeal sent the case back to the county court judge to answer the question of fact, whether, as a matter of common sense, the flat was personally occupied at the material dates by the tenant as a home. Evershed M.R. approved the summary of this topic given on p. 153 of the 6th edition of Megarry's The Rent Acts.

(Rent Restrictions Guide, 3rd ed., p. 102; Megarry, 6th ed., p. 153.)

Strutt v. *Panter* [1953] 2 W.L.R. 406; [1953] 1 All E.R. 445

Rent Restrictions Acts—order for possession against statutory tenant taking a transmitted statutory tenancy on the terms that the landlord should let to her alternative accommodation—effect of order to create a new contractual tenancy.—In this case the landlord obtained an order for possession against the widow of a statutory tenant (the widow having succeeded her husband as a statutory tenant by virtue of section 12 (1) (*g*) of the 1920 Act) on the terms that the landlord let to the widow a similar dwelling at the same rent.

The widow occupied the latter dwelling for a time and then died. The landlord claimed possession from the widow's daughter, who claimed that she in turn was entitled to a statutory tenancy by reason of section 12 (1) (*g*). If the widow's transmitted statutory tenancy could be regarded as having been translated from the first house to the second, then the daughter had no right to invoke section 12 (1) (*g*), since that provision operates once only in transmitting a tenancy and had spent its force in transmitting a tenancy to the widow. If, on the other hand, the widow's tenancy of the second house was contractual, the daughter had a valid claim under section 12 (1) (*g*) to a statutory tenancy by virtue of *Moodie* v. *Hosegood* [1952] A.C. 61. The Court of Appeal, affirming the county court judge, held that the widow had obtained a new contractual tenancy of the second house. Her statutory tenancy of the first house was not carried over to the second. The reason given for this by Evershed M.R. was that a statutory tenancy can come into existence only by a contractual tenant remaining in possession of the subject-matter of the tenancy after the contract has been determined. It must, however, be observed that, since *Moodie* v. *Hosegood* this is not quite correct, and indeed the daughter's position in the present case shows that it is not quite correct. Until *Moodie* v. *Hosegood* it was true to say that, although a widow or member of a tenant's family could take an existing statutory tenancy by transmission, only a former contractual tenant could claim a statutory tenancy *de novo*. Now, however, as Megarry has pointed out (in L.Q.R., Vol. 67 (1951), p. 515) " a new statutory tenancy can arise in favour of a person who has never been a tenant but has been at most a mere licensee or matrimonial occupier." Although Evershed M.R. has stated too widely the grounds of the present decision, it certainly seems clear that a statutory tenancy in house A cannot be translated to house B, and that the decision is itself sound.

It may be noted that in the present case the landlord could, as soon as the widow was in occupation of the second house, have determined the contractual tenancy with a view to increasing the rent to the full recoverable rent. Evershed M.R. suggested that, if such action is to be prevented, orders of this kind should contain a further undertaking by the landlord not, while the tenant complies with the terms of the tenancy, to determine the contractual tenancy in order to increase the rent, without the leave of the court or on such other terms as the county court judge may think proper.

(Rent Restrictions Guide, 3rd ed., p. 100; Megarry, 6th ed., pp. 142, 178.)

Mauray v. *Durley Chine (Investments), Ltd.* [1953] 1 W.L.R. 524; [1953] 1 All E.R. 712

Furnished Houses (Rent Control) Act, 1946—reduction of rent by tribunal—effect on option exercisable by tenant to claim a new lease.—An option given to a tenant to take a new lease at the same rent and on the same terms as an existing lease remains valid and exercisable by the tenant notwithstanding the fact that, subsequently to the date

of the document creating the option, the rent is reduced by a rent tribunal under the Furnished Houses (Rent Control) Act, 1946. In this case the rent of a flat had been reduced from £525 to £425 per annum, and, on the tenant's purporting to exercise the option, the landlords claimed that it was void, as it would involve the " requiring " of a rent higher than the rent registered under the 1946 Act. Gerrard J. rejected the landlords' arguments, and held that the option remained valid, and had been effectively exercised by the tenant. He held (a) the grant of a lease to commence *in futuro* at £525 per annum did not necessarily involve any illegality, since the tribunal might, on reconsideration, raise the rent from £425 to £525 or more before the new lease began to run; (b) a covenant in a lease to pay more than the registered rent is not a " requirement " in the sense in which " require " is used in the Act, although an attempt to enforce the covenant probably would be; (c) in any case, such a covenant would not render the whole lease void.

(Rent Restrictions Guide, 3rd ed., pp. 117 *et seq.*; Megarry, 6th ed., p. 366.)

Pasmore v. *Whitbread & Co., Ltd.* [1953] 2 W.L.R. 359; [1953] 1 All E.R. 361

Landlord and Tenant Act, 1927—*meaning of " predecessors in title " in section* 4 (1)—*premises not business.*—The words " predecessors in title " in section 4 (1) of the Landlord and Tenant Act, 1927, mean predecessors in regard to the tenant's interest in the premises, not predecessors in regard to the goodwill of the business. The result was, in this case, unfortunate for the tenant. Instead of obtaining the assignment of the tenancy of his predecessor in the business he was granted a new tenancy, the tenancy of the predecessor in the business having been surrendered. If he had obtained an assignment he could have added together the period during which the assignor had carried on the business and his own period to make up the qualifying period of " not less than five years." As, however, he got a new tenancy, he could not. His predecessor in the business was not a " predecessor in title," and, accordingly, the qualifying period had not been completed. The decision will commend itself to lawyers as clearly correct on the interpretation of the statute. Whether it reveals a defect calling for remedy is a matter for Parliament.

(Woodfall, 24th ed., pp. 1075 *et seq.*)

Osborne v. *Snook* [1953] 1 W.L.R. 322; [1953] 1 All E.R. 332

Leasehold Property (Temporary Provisions) Act, 1951—*omission in application of particulars required by County Court Rules—not a fatal defect.*—It was held in this case that an application for a new tenancy under section 10 (1) of the Leasehold Property (Temporary Provisions) Act, 1951, was valid notwithstanding the omission of

certain particulars required by Order 40A of the County Court Rules, 1936, as amended by the County Court (Amendment) Rules, 1951. Compliance with the provisions of the Rules was not a condition precedent to the jurisdiction of the court to entertain the application, and leave to amend the application by the addition of the necessary particulars should be granted. The county court judge had refused leave to amend on the ground that to grant it would deprive the landlord of the advantage of section 11 (1) (*a*) of the 1951 Act, which requires the application to be made within a certain time. The original defective application had been made within the time limit but that period had expired before the hearing. The Court of Appeal reversed the county court judge, and gave leave to amend. They distinguished *British and Colonial Furniture Co., Ltd.* v. *William McIlroy, Ltd.* [1952] 1 K.B. 107, on the ground that section 4 (1) of the Landlord and Tenant Act, 1927, required that the actual form of application prescribed by the Rules must be read into the section. Here the Rules merely provided a form by way of guidance, and there was nothing in the Act to require the use of the actual form laid down in the Appendix to the Rules to be regarded as essential to a valid application.

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6. *REVENUE CASES*

By Desmond Miller, of the Inner Temple, Barrister-at-Law

(*Note*:—Where a case is not reported in any of the general series of law reports it is cited from the *Annotated Tax Cases* (A.T.C.) or *Taxation Reports* (T.R.).)

Income Tax

Bridges v. *Watterson* [1952] 2 All E.R. 910; [1952] T.R. 441 (Ch.D.).

Statutory provisions: Case V of Schedule D, the Income Tax Act, 1918.

Point: The normal type of pension scheme provides for pensions to be payable after retirement and during life. The fact that the scheme further provides that the total of the sums paid by way of pension shall not be less than the aggregate of the pensioner's contributions does not involve the conclusion that sums paid to the pensioner are—at least until he has received the aggregate of his contributions—repayments of capital. *Perrin* v. *Dickson* [1930] 1 K.B. 107, distinguished. *Sothern-Smith* v. *Clancy* [1941] 1 K.B. 276, considered.

A. & J. Mucklow, Ltd. v. *C. I. R.* [1952] 2 All E.R. 1094; [1952] T.R. 449 (Ch.D.).

Statutory provisions: Section 21, the Finance Act, 1922; section 31 (4), the Finance Act, 1927 (now see sections 245, 246 and 252, the Income Tax Act, 1952).

Point: The provisions of section 31 (4), *supra*, are not mandatory and do not require that a surtax direction shall be made for the period from the date of the last account to the date of the resolution for liquidation. The Commissioners must apply the tests laid down by section 21 of the Finance Act, 1922, to this final period and unless they come to the conclusion that the company has acted unreasonably in withholding the company's income from distribution no direction in respect of this period should be made. *Collier & Sons, Ltd.* v. *C. I. R.* [1933] 1 K.B. 488 considered and distinguished.

Bolson & Sons, Ltd. v. *Farrelly*, 31 A.T.C. 502; [1952] T.R. 461 (Ch.D.).

Statutory provisions: Case I of Schedule D, the Income Tax Act, 1918.

Point: Whether profits arise from an operation in the nature of trade is a question of fact for the Commissioners, and the court will not interfere with the Commissioners' finding unless there is no evidence to support it.

Facts and Decision: The appellant company was incorporated in 1931 to take over and operate an existing business of providing sea trips for holiday makers. This business was operated until 1939 when, by reason of war conditions, it ceased. At the end of the war and by reason of the war the company's trade consisted in ship-building and repairing.

There was evidence that the company was anxious to recommence its passenger-carrying activities and with that object in view, during the years 1945 to 1948, had purchased a number of vessels. The company carried out extensive repair work on these vessels (12 in number) but for one reason or another they could not be brought into use as passenger-carriers and were resold at a considerable profit. Assessment was raised upon these profits as being the profits of a trade.

The General Commissioners found that the profits were liable to tax and it was agreed that the only question for the court was whether there was evidence before them to sustain this finding. Held (affirming the Commissioners' determination), that the profits arising from the sale of the ships in question were liable to tax.

Turvey v. *Dentons (1923), Ltd.* [1952] 2 All E.R. 1025; [1952] T.R. 471 (Q.B.D.).

Statutory provisions: Rule 1 of Number VIII of Schedule A, the Income Tax Act, 1918; sections 13 and 17, the Finance Act, 1940 (now sections 172 and 177, the Income Tax Act, 1952).

Point: The length of a lease is a question of fact, and, where failure to deduct tax at the standard rate pursuant to section 17, *supra*, was due to a mistake as to the length of the lease the payer was entitled to recover the overpayments of rent as money paid under mistake of fact.

Stamp Duty

Baddeley (Newtown Trustees) v. *C. I. R.* [1952] T.R. 485 (Ch.D.).

Statutory provisions: Section 54 (1), the Finance Act, 1947.

Point: The saving accorded by section 54 (1), *supra*, extends to trusts established for charitable purposes only.

Estate Duty

D'Avigdor-Goldsmid v. *C. I. R.* [1953] 2 W.L.R. 372; [1953] 1 All E.R. 403; [1953] T.R. 29 (H.L.).

Statutory provisions: Section 2 (1) (d), the Finance Act, 1894; section 30 (1), the Finance Act, 1939.

Point: While the words "other interest" in section 2 (1) (d), *supra*, may be apt to cover a policy of life assurance; since the interest "purchased or provided" by the deceased in such a policy is the beneficial interest under the contract of assurance (as distinguished from the proceeds of the policy payable at his death) there can be no charge of duty under section 2 (1) (d), where the life policy is assigned to a donee before the relevant death. *Att.-Gen.* v. *Dobree* [1900] 1 Q.B. 442; *Att.-Gen.* v. *Robinson* [1901] 2 Ir.R. 67 distinguished. *Lord Advocate* v. *Hamilton's Trustees*, 1942 S.C. 426 approved.

Facts and Decision: The deceased in 1904 effected a policy of assurance on his own life and for his own benefit; in 1907 he married and by ante-nuptial settlement (inter alia) the policy was settled by him. Under the limitations of trust a protected life interest was reserved to the deceased and subject thereto, and to a rentcharge in favour of his wife, the settled property was limited to the first and other sons of the marriage in tail male. The deceased covenanted to pay the premiums on the policy as they fell due. In 1928, by private Act of Parliament, the deceased was empowered to deal with his protected life interest and pursuant thereto by deed of resettlement executed in 1930, the property therein specified, including the policy of assurance, was settled on such trusts as the deceased and his eldest son should jointly appoint, but subject to certain declared trusts. The deceased again covenanted to pay the annual premiums.

In 1934, by virtue of powers conferred by the deed of resettlement, the deceased and his eldest son appointed part of the settled property, including the policy, to the son absolutely, with the result that the son became absolute beneficial owner of the policy. Thereafter until the deceased's death the son paid the annual premiums as they fell due. In all 37 premiums were paid of which 31 were paid by the deceased, *viz.*: four prior to the date of the marriage settlement, 23 prior to the date of resettlement and four thereafter.

The Crown claimed estate duty on the policy moneys under section 2 (1) (c) of the Finance Act, 1894, or alternatively, under section 2 (1) (d), *ibid.*; as amended by section 30 (1) of the Finance Act, 1939:—

(i) under section 2 (1) (c) on the ground that the son was a donee of the policy moneys under the original settlement of 1907 and in this view that the charge of duty extended to 9/11ths of such moneys, *i.e.*,

$$\frac{27 = \text{premiums paid by deceased}}{33 = \text{total premiums paid from date of settlement in 1907;}}$$

(ii) under section 2 (1) (d) on the grounds that the policy moneys constituted an interest beneficially arising to the son on the death of the deceased and that that interest was to be treated as having been wholly provided by the deceased as a result of the appointment of 1930 (in the son's favour) having comprised property other than the policy.

Vaisey J. dismissed the Crown's claim under both subsections (1) (c) and (1) (d) of section 2. The Court of Appeal, reversing the decisions of Vaisey J. (noted Vol. 15, p. 449) held:—

(i) that the word "donee" in section 11 (1) of the Customs and Inland Revenue Act, 1889, as re-enacted by section 2 (1) (c) of the Finance Act, 1894, must be given its natural meaning and in particular was not equivalent to "grantee";

(ii) that as the son derived title to the policy moneys under his father's marriage settlement of 1907 he was within the marriage consideration and could not therefore be aptly described as a donee within the meaning of section 2 (1) (c). *Att.-Gen.* v. *Jacob-Smith* [1895] 2 Q.B. 341 applied—*the Crown's claim to duty under this head therefore failed.*

(iii) that there was an "interest," namely, the benefit of the policy of assurance and by virtue of section 30 (1) of the Finance Act, 1939, that interest was provided by the deceased;

(iv) that the benefit of the policy (*i.e.*, of the contract of insurance) passed to the son under the 1934 appointment, but the right to receive the sum assured, which only arose upon the death of the deceased, was a beneficial interest arising within section 2 (1) (d). *The Crown's claim to duty under this head therefore succeeded.*

The taxpayer appealed against the Court of Appeal's decision, in so far as it related to the claim under section 2 (1) (d), but the Crown did not cross-appeal in respect of the decision under section 2 (1) (c).

Held (reversing the decision of the Court of Appeal): that the rights under which the policy moneys became payable on the deceased's death had belonged to the assignee (the son) since the date of the assignment to him in 1934 and that no beneficial interest (in the policy) therefore accrued or arose on the death of the deceased.

The Crown's claim to duty accordingly failed.

Coutts & Co. v. *C. I. R.* [1953] 2 W.L.R. 364; [1953] 1 All E.R. 418; [1953] T.R. 43 (H.L.).

Statutory provisions: Sections 2 (1) (b) and 7 (7), the Finance Act, 1894.

Point: The word "interest" in section 2 (1) (b), *supra*, bears no technical meaning. Thus, where settled property is invested (inter alia) in life policies the rights of the remaindermen to compel the payment of the premiums required to keep such policies on foot is not an interest for this purpose, their interest being in the sums which become payable on maturity of the policies.

Facts and Decision: By deed of appointment and resettlement executed in 1935 the deceased (Captain Brassey) and his son (Hugo) appointed certain property upon trust (inter alia) as to the income,

(i) to apply the same in payment of the premiums due upon certain policies of assurance on Captain Brassey's life (which the trustees had purchased from him);

(ii) as to the remainder upon protective trusts for Hugo during his life.

Subject to these trusts the capital of the settled property was limited in favour of Hugo's issue, as he should appoint, and failing issue as he should appoint by will. In so far as the foregoing trusts should prove inapplicable the limitations of the original settlement (dated 1897) would be effective and under these limitations the trust property devolved as appointed by Captain Brassey's will or failing appointment upon Hugo's sisters as respective tenants in tail.

The premiums were duly paid until Captain Brassey's death in 1946. At this date it appeared that Hugo was unmarried and had no issue, further that he had not exercised the general power of appointment reserved to him.

The Estate Duty Office claimed duty on Captain Brassey's death under section 2 (1) (b) and for this purpose maintained:—

(i) that upon the death the interest of the remaindermen, which consisted in requiring (at need) that the income of the trust fund should be applied in payment of the premiums, ceased, and,

(ii) that a benefit arose, namely, that the sum previously required to satisfy the premiums (*viz.*, £1,977 per annum) was no longer withdrawn for this purpose and became immediately available for the enjoyment of the person (*viz.*: Hugo) entitled under protective trusts to the income of the trust premises.

The claim to duty extended to that portion of the trust fund which was required by the income thereof to meet the payment of annual premiums on the policies of assurance.

The Court of Appeal (*sub nom. Re Brassey's Settlement,* noted Vol. 15, p. 294) (affirming the decision of Romer J.) held:—

(i) that the right vested in the remaindermen by which they could require the trustees to apply the income of the settled funds in payment of the premiums was an interest possessed by the remaindermen within section 2 (1) (b);

(ii) that on Captain Brassey's death that interest ceased;

(iii) that a benefit arose on the death and the extent of that benefit was the proportion of the trust funds required by its income to satisfy the payment of the annual premiums on the policies of assurance.

Held (reversing the decision of the Court of Appeal): that the interest of the daughters lay in the possibility of receiving the sum assured and that the payment of the premiums was only incidental to that interest. On Captain Brassey's death there was no alteration in this interest and it followed no cesser of interest within section 2 (1) (b). *The Crown's claim accordingly failed.*

Re Hodson's Settlement [1939] Ch. 343 and *Westminster Bank, Ltd.* v. *Att.-Gen.* [1939] Ch. 610 distinguished.

Hetherington's Trustees v. *Lord Advocate,* 31 A.T.C. 443; [1952] T.R. 407 (C.S.).

Statutory provisions: Section 38 (2), the Customs and Inland Revenue Act, 1881; section 11 (1), the Customs and Inland Revenue Act, 1889; section 2 (1) (c), the Finance Act, 1894.

Point: Where property is settled upon trust for various persons in succession and the death of the settlor follows within five years of settlement it is necessary, in determining what property is to be deemed to pass at that death within the provisions of section 2 (1) (c), *supra,* to have regard to the property comprised in the settlement at the date of death. *Re Payne* [1940] 1 Ch. 576 followed.

Facts and Decision: The Settlor executed a deed of trust in 1946; under the limitations of trust his daughter Elizabeth was entitled to a life interest in the trust funds with remainder over to her issue and in default of issue to her sister and the latter's issue. The deed declared that the trust fund consisted in the sum of £5,000 sterling vested in the trustees.

The deed was executed on December 19, 1946, and on December 24 the settlor paid £5,000, by cheque, to the trustees' solicitors who thereupon applied for and were allotted, by way of original allotment, 5,000 Ordinary shares at par in a company called Creamola (England), Limited. At that date the settlor possessed the controlling interest in the company but it was conceded that this fact was not material for the present purpose.

The settlor died in 1948 and at his death the Estate Duty Office claimed that the property then deemed to pass by virtue of section 2 (1) (c) was the settled property in its then state and value (which was

admitted to be £9,250) and not the sum of £5,000 handed over at the date of settlement by the settlor to the trustees.

The Court of Session were of opinion:—

(i) that the relevant charging words, contained in section 38 (2) of the Act of 1881, *viz.*: "any property taken under a disposition purporting to operate as an immediate gift *inter vivos*," directed attention to the disposition, to determine the subject-matter of gift;

(ii) that viewed from this aspect (*i.e.*, of the disposition) the beneficiaries did not take what passed from the settlor (in this case £5,000) but rights under the trust.

Accordingly the court (by majority decision) held that the value to be brought in for Estate Duty purposes was the value of the trust fund as at the date of the settlor's death.

Re Goetze, National Provincial Bank, Ltd. v. *Mond* [1953] 2 W.L.R. 26; [1953] 1 All E.R. 76 (C.A.).

Point: A direction that a legacy is to be paid "free of death duties," or, "free of all death duties," found in a will executed in Great Britain, by a domiciled British subject, is prima facie confined in its operation to death duties exigible by the laws of this country. If, however, there are attendant circumstances of a quality and degree sufficient to show beyond reasonable doubt that the testator must have intended to include freedom from foreign duties also, effect will be given to that intention. *Re Cunliffe-Owen* [1951] Ch. 964 approved and applied.

Att.-Gen. for Ceylon v. *Mackie's Executors* [1952] 2 All E.R. 775; 31 A.T.C. 435 (P.C.).

Statutory provisions: Section 20 (1), the Ceylon Estate Duty Ordinance, 1938.

Point: Where value is directed to be ascertained as at the date of death, that raises an issue of fact, to be decided upon the evidence laid. Where the evidence showed that profits and losses of the company's business has fluctuated considerably, and further that there existed a general disruption in business conditions, owing to war circumstances, it was not possible to reach a fair valuation of shares in the company by reference to past profits or future potential profits, since this method involved purely theoretical calculations.

In such circumstances the court held that valuation of the shares should be made by reference to the tangible assets comprised in the balance sheet.

(*Note*: Section 20 of the Estate Duty Ordinance of 1938, required that the value of property should be estimated to be the price which, in the opinion of the assessor, such property would fetch in the open market at the time of death of the deceased; *cf.* section 7 (5), the Finance Act, 1894.)

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7. *MISCELLANEOUS*

Otter v. *Church, Adams, Tatham & Co.* [1953] 1 W.L.R. 156; [1953] 1 All E.R. 168

Solicitor and client—negligence in construing a will.—The defendants, a firm of solicitors, were asked to advise the plaintiff, as guardian of her son M., on his rights under a will. She was advised that M. was absolutely entitled on attaining majority. When M. attained majority the plaintiff, as his agent, asked the defendants whether any steps were necessary to transfer the property in question to him and they advised that the transfer could await M.'s return to England. The defendants knew that M. was serving with the Royal Air Force in India. M. was killed in a flying accident and died intestate and a bachelor. It was then discovered that M.'s interest in the property in question was not absolute but only an entailed interest and the plaintiff, in yet a third capacity, as administratrix of M.'s estate, sued the defendants for negligence, claiming the value of the property which, on failure of the entailed interest, passed to M.'s uncle. The court held: (i) that the defendants were guilty of negligence in construing the will, the relevant clause whereof was in a perfectly ordinary form; (ii) that the damages were not limited to the nominal damages which the deceased could have recovered in his own lifetime, but extended to the value of the property which was lost to M.'s estate.

Hinde v. *Hinde* [1953] 1 W.L.R. 175; [1953] 1 All E.R. 171

Husband and wife—consent maintenance order.—Two days after the making of a decree absolute, the Divorce Court made a maintenance order by consent of the parties providing for the husband to pay maintenance to the wife "until remarriage." The husband predeceased the wife, who claimed maintenance under the order for the period after the death. Under the Judicature Act, 1925, s. 190 (now the Matrimonial Causes Act, 1950, s. 19), the court can on divorce make an order for secured provision during the life of the wife and for maintenance during the joint lives of the parties. The Court of Appeal held that: (i) if the order was to be enforceable as an order of the Divorce Court it could only be for the joint lives of the parties; and (ii) there was nothing in the order which indicated any contrary intention, and that it should therefore be construed as limited to the joint lives. By consent an order can be made which is beyond the statutory powers of the court: see, *e.g.*, *Maidlow* v. *Maidlow* [1914] P. 245, an order for payment of maintenance to a wife "for her life," and *Mills* v. *Mills* [1940] P. 124, an order providing for payment of a lump sum in lieu of maintenance; but such a consent order is no more than evidence of the parties' contract (*per* Morris L.J. [1953] 1

W.L.R. at p. 185) and ensures that such a contract is not illegal. If the wife, in the instant case, wished to allege that the parties had entered into a contract extending beyond their joint lives, her remedy was by action for breach of contract and not by proceedings merely to enforce a Divorce Court order.

Brewer v. *Westminster Bank, The Times,* February 5, 1953

Joint banking account—cheques forged by one executor.—In *Brewer* v. *Westminster Bank* [1952] 2 T.L.R. 568 (noted Vol. 16, pp. 321 and 385) McNair J. held that, where two executors had a banking account and it was agreed with the bank that cheques should be signed by both, and one executor signed cheques and forged the second signature, nevertheless the bank was not liable to the innocent executor. An appeal against the decision was lodged and opened. The bank then agreed to compensate the innocent executor in full and to pay the costs and the appeal was accordingly not proceeded with. Surely the settlement should have been noted in the law reports, for the terms of settlement weaken very considerably the force of McNair J.'s decision? It is to be hoped that Parliament will find time to clarify the law without delay.

Re Cohen [1953] 1 W.L.R. 303; [1953] 1 All E.R. 378

Husband and wife—title to banknotes hidden in the matrimonial home.—After the death of the husband and wife nearly £6,000 in banknotes was discovered hidden in various parts of the matrimonial home, a flat which was the property of the wife. There was no evidence as to the ownership of the money, its origin or why it was hidden. The court held that, in the absence of evidence of ownership, the legal presumption that the owner of the land is prima facie the owner of the chattels found on the land applied and the wife's estate was entitled to the money. Where a husband and wife contribute various sums from time to time to a common fund for the household, in the absence of any other agreement, the fund belongs to them jointly: *Jones* v. *Maynard* [1951] Ch. 572; *Rimmer* v. *Rimmer* [1953] 1 Q.B. 63; but, even if these had been the facts, the result would have been the same as the wife survived the husband and would have become entitled to the whole fund on the husband's death. It may be noted that, had this been the ground of the decision, there would have been an increase in the liability for death duties on the husband's estate.

British Electrical Industries v. *Patley Pressings, Ltd.* [1953] 1 W.L.R. 280; [1953] 1 All E.R. 94;

Nicolene, Ltd. v. *Simmonds* [1953] 2 W.L.R. 717; [1953] 1 All E.R. 822

Construction of commercial contracts—consensus ad idem.—In both these cases the contracts in question were drafted by laymen and one cannot help feeling sympathy for the draftsmen whose intentions were frustrated. In the first case there was a clause in the sellers' contract note, "subject to force majeure conditions that the government restricts the export of the material at the time of delivery." The buyers evidently found little difficulty in understanding the contract note for they accepted the offer made in the note. When the sellers were sued they alleged that the clause was so uncertain as to render the contract unenforceable, there being a variety of force majeure conditions in the trade and no agreement having been reached between the parties as to which of such conditions should apply. If the phrase "force majeure conditions" meant "force majeure contingencies" or "force majeure circumstances," the word "conditions" would have added nothing to the phrase and there would have been a valid contract. McNair J. held, however, that the phrase "force majeure conditions" meant "force majeure clauses" or "force majeure stipulations" and was too vague: see *Bishop and Baxter, Ltd.* v. *Anglo-Eastern Trading Co., Ltd.* [1944] K.B. 12 ("subject to war clause"). Hence there was no *consensus ad idem.*

In the second case, in reply to an order the seller wrote: "As you have made the order direct to me, I am unable to confirm on my usual printed form which would have the usual force majeure and war clause, but I assume that we are in agreement that the usual conditions of acceptance apply." There were no usual conditions of acceptance in operation between the parties. It was held by the Court of Appeal that the words in question were meaningless and did not prevent the acceptance being unqualified.

In the first case McNair J. said [1953] 1 W.L.R., at p. 284, that the "cases seem to me to establish that, notwithstanding that the parties may have thought and acted on the basis that a contract existed between them, no *consensus ad idem* will be held to exist *where there still remains to be negotiated and agreed* the exact form of the clauses or conditions referred to by the parties." (The italics are ours.) In the second case both Singleton and Denning L.JJ. pointed out that the parties themselves treated the contract as subsisting and Denning L.J. indicated that he was of the opinion that, if the exempting clause in the *British Electrical Industries Case* was agreed but was so vague and uncertain as to be incapable of any precise meaning, the contract should have been treated as valid, the clause being ignored. It is to be hoped that the construction of commercial contracts is not to be approached in the same attitude as the construction of conveyances settled by equity draftsmen. If two businessmen think they have entered into a contract and act on that footing the court should struggle to find there is a contract: see, *e.g.*, *Foley* v. *Classique Coaches, Ltd.* [1934] 2 K.B. 1 and *Hillas* v. *Arcos* (1932) 38 Com.Cas. 23; but, equally, where they have sought to introduce a

term into the contract the court should not be astute to reject the term on the ground that it is meaningless.

Newborne v. *Sensolid (Great Britain), Ltd.* [1953] 2 W.L.R. 596; [1953] 1 All E.R. 708

Unincorporated company—purported contract in its name.—It is trite law that, if an agent purports to contract on behalf of a company not yet incorporated, on incorporation the company cannot ratify the contract and the agent becomes personally liable in its stead: *Kelner* v. *Baxter* (1866) L.R. 2 C.P. 174. "Both upon principle and upon authority it seems to me that the company never could be liable upon this contract, and construing this document *ut res magis valeat quam pereat*, we must assume that the parties contemplated that the persons signing it would be personally liable" (*per* Willes J. at p. 175). The reasoning is simple: both parties intended someone was to be liable and, if not the company, that person must be the agent; any other result would be unjust. *Newborne* v. *Sensolid (Great Britain), Ltd.* establishes the injustice as good law over a wide field. A contract was signed "L. N. (London), Ltd., L. N." L. N. (London), Ltd., had not then been incorporated and L. N. sued personally. The Court of Appeal held that L. N. could not sue. The signature purported to be the signature of a company; L. N. did not purport to sign as agent. Accordingly the principle of *Kelner* v. *Baxter* did not apply. It is to be regretted that, without a single authority to support, much less necessitate, such a result, the Court of Appeal has felt obliged to curtail the operation of the principle so drastically and illogically.

THE LIBRARY

Prideaux's Precedents in Conveyancing. Vol. 3. Twenty-fourth Edition. By the late J. Brook Richardson, m.a., ll.b., Barrister-at-Law. London: Stevens & Sons, Ltd., and Solicitors' Law Stationery Society, Ltd. cxi and 1090 (including index 120) pp. (£4 15s.)

This handsomely produced volume completes the latest edition of this well-known and well-tried work and was substantially completed by its editor before his death. It deals with settlements, trusts, wills, assents, charities, etc., and its scheme is to provide in each section a general dissertation on the relevant law, a generous selection of clauses which may be compounded as necessary and a number of complete documents. The precedents appear to be admirable both in content and selection and it is pleasing to see that the dead wood has been so thoroughly pruned. Now that the majority of settlements are made with half an eye on the beneficiaries and one and a half eyes on the Revenue authorities, it is encouraging to find a section boldly headed "Settlements Avoiding Income Tax, etc.," but alas it only extends to nine pages. Almost 200 pages are devoted to precedents of wills and these will be of the greatest assistance to those engaged in this most difficult branch of draftsmanship.

One or two specific points. Your reviewer is not at all happy about clause 3, p. 217, whether or not the words in square brackets are used. If the accumulations come to an end on the death of the settlor, might there not be a passing of the whole settled funds because the beneficial interests change, in that the accruing income will no longer be "rolled-up" for the benefit of those contingently entitled on failure of the infant's interest? (See *Re Hodson's Settlement* [1939] Ch. 343.) Very "strong" powers to professional trustees to charge are given at pp. 158, 320 and 757, and practitioners might have been warned that in *Re Ames* (1884) 25 Ch.D. 72, Kay J. said that provisions in such terms ought not to be inserted by a solicitor-trustee in a will drawn by himself "unless the testator has instructed him to insert those very words": one wonders what Kay J. would have said to the second paragraph of Precedent 105 on p. 757. At pp. 284 and 816 a modified name and arms clause is provided which is a valiant attempt to overcome *Re Bouverie* [1952] Ch. 400, and *Re Woods' Will Trusts* [1952] Ch. 406. Whether it will survive the apparently strongly running tide of judicial opinion remains to be seen. The references at p. 316 to the Settled Land Act improvements "now authorised" seem to be incomplete without mention of the Agricultural Holdings Act, 1948, and *Re Duke of Northumberland* [1951] Ch. 202.

The volume contains some 260 pages of general statements of the law. Now half a dozen pages on (say) appointments of new trustees or disentailing assurances are to be welcomed but here are 100 pages on trusts and settlements and another 100 on wills, neither of which seem to add anything at all to the recognised textbooks, and your reviewer is rather at a loss to understand their exact function particularly as there seems to be no system of reference back from the precedents to these pages. For example, 15 pages are devoted to a wife's property and contracts (discreetly omitting any reference to the new species of property with which wives were endowed in *Bendall* v. *McWhirter* [1952] 2 Q.B. 466): now certain difficulties arise in the case of infant wives and these are dealt with (as they should be) in footnotes to the precedents at pp. 107, 137 and 194: what then is the object of dealing with

them at p. 82 divorced from any precedent? Again there are six pages devoted to estate duty: apart from the utter futility of trying to say anything useful about estate duty in six pages is there any user of this book who does not also have access to one of the three standard works on estate duty and is that not where one would look for guidance? It may be that some readers like to have a series of epitomes of textbooks bound up with a collection of precedents but to the writer it is unnecessary duplication and whilst he will constantly use the precedents in this volume it will be rarely that he will look to the textbook pages.

G. B. G.

Williams on Executors and Administrators. Thirteenth edition. By Sir David Hughes Parry and Donald Charles Potter. London: Stevens & Sons, Ltd. 1953. 2 Vols. ccxxvii and 1,347 pp. (£8 8s. net.)

There will be no hesitation in the welcome given by those engaged in probate practice to the new edition of this leading work, first published over 120 years ago. Sir David Hughes Parry, who transformed the twelfth edition so as to bring it into line with the 1925 legislation, continues the process of adjustment to post-1925 experience and practice with the help of D. C. Potter, of the Middle Temple and Lincoln's Inn. It may well be said that the blending of new material with the original author's work, which was a marked innovation in the preceding edition, is now so far advanced that a new substance has emerged. The new edition has been specially pruned so as not to overlap its companion volumes, Jarman and Theobald, or to deal any more than necessary with the allied subjects of trusts and death duties. Apart from this it is clear that the whole text has undergone a monumental overhaul, a thorough purging, condensing, revising and rewriting, so as to cut out and cut down obsolete and obsolescent material, and to provide room for new matter and for subjects whose importance has increased in the 20-odd years since the last edition appeared. The net result is a book about 100 pages shorter than its predecessor.

Of the new material, the chapter (43) on Charities has benefited conspicuously from a complete rearrangement of the subject-matter and Chapter 88 on the Limitation Act is concise and well set out. The perpetuity rules are given a chapter to themselves (56) instead of being scattered in various places. It was, however, most unfortunate that the Intestates' Estates Act, 1952, did not become law soon enough to be incorporated into the text, though the Act itself is given in full in the appendix. This is particularly so as the chapter on the Inheritance (Family Provision) Act, 1938, makes its first appearance in this edition.

It is noticeable that considerable effort has been made to render the text more comprehensible and lucid, and that the ponderous "It should be added that . . ." and "Finally, it must be observed that . . ." have been rigorously suppressed.

In the last 20 years a most striking change has come over the physical appearance of legal textbooks, and the new Williams is no exception. The sidenotes have gone, the paragraphs are numbered, headed, and set well apart, the chapters are also numbered from beginning to end and the cross-referencing is by pages and not by part, book, chapter and section. What a pleasure to read Ord. 38, r. 3 and not Ord. XXXVIII, r. 3! There is also a noticeable improvement in the index and in the table of statutes.

This book will be an invaluable companion to many practitioners who will surely feel a debt of gratitude and thanks to the editors for the enormous amount of labour they have done to bring the work up to date and yet to keep it within reasonable proportions.

S. M. T.